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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1818

FORD MOTOR COMPANY, a Delaware Corporation,
Petitioner,

v.

COLONIAL FORD, INC., a Utah Corporation, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Ford Motor Company ("Ford") respectfully petitions for a writ of certiorari to review so much of the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this case on February 5, 1979, as affirmed the decision of the district court granting judgment to Colonial Ford, Inc. ("Colonial") against Ford.

OPINIONS BELOW

The judgment of the court of appeals was entered in accordance with its original opinion in this case, filed May 31, 1978, as clarified by its opinion on rehearing, filed February 5, 1979. The original majority opinion and the separate concurring and dissenting opinion of the court of appeals are reported at 577 F.2d 106. The opinion on rehearing is reported at 592 F.2d 1126. These opinions are reprinted in a separate appendix to this petition. The judgment of the district court was entered without opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1979. On April 19, 1979, Mr. Justice White extended the time to file this petition until June 5, 1979. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented by the Tenth Circuit's decision as to this petitioner are:

1. Whether the Automobile Dealer Franchise Act (the "Dealer Franchise Act"), 15 U.S.C. §§ 1221 *et seq.*, prohibits an automobile manufacturer from:

   (i) conditioning its acceptance of a prospective dealer's application for a franchise upon the applicant's commitment to provide physical facilities adequate for effective competition with dealers selling other makes of car, and

   (ii) requiring a dealer who has made such a pre-franchise commitment to fulfill it after the franchise is granted.

2. Whether the Dealer Franchise Act prohibits an automobile manufacturer from refusing to accept a prospective dealer's application for a franchise unless a person possessing desired qualifications of experience and capability is named as a participant in the ownership and management of the prospective dealership.[1]

1. Ford wishes to reserve an additional question for argument in the event that this petition is granted. That question is whether the Tenth Circuit erred in relying in its affirmance on a theory of causation not presented to the jury and not addressed by either party at the trial. The theory was to the effect that Colonial's shortage of working capital, which resulted in its injury, was attributable to Ford's insistence that a person of experience and skill, but little money, be included as a stockholder in Colonial. *See infra*, p. 12.

STATUTORY PROVISIONS INVOLVED

The Dealer Franchise Act, 15 U.S.C. §§ 1221-25 (1976), provides, in pertinent part:

> "[§ 1221] As used in this [Act]–
>
> . . . .
>
> (e) The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.
>
> "[§ 1222] An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

The full text of the Dealer Franchise Act is set forth in a separate appendix to this petition.

STATEMENT OF THE CASE

The Parties

Petitioner Ford is an automobile manufacturer which sells a wide variety of automotive products, including automobiles, through franchised[2] dealers. Colonial was a franchised Ford dealer in Salt Lake City, Utah. Ford Motor Credit Company ("Ford Credit") is a wholly-owned subsidiary of Ford which, among other things, supplies financing to franchised Ford dealers pursuant to floor-plan arrangements.[3] Ford Credit provided such financing to Colonial. An appellant and cross-appellee below, Ford Credit is filing a separate petition for a writ of certiorari. Petitioner Ford does not seek review of the judgment below insofar as it determined claims between Colonial and Ford Credit.

Ford's Relationship with Its Franchised Dealers

Ford does not sell its products directly to consumers, but instead relies almost entirely upon independent franchised dealers to represent it in the marketplace and to compete there with dealers representing Ford's competitors. Ford's own success ultimately depends on the ability of its dealers to compete vigorously and effectively–to penetrate the market and achieve for Ford products a satisfactory volume of sales, to service the Ford products sold, and to maintain the

2. The term "franchise," in its various forms, as used herein, has a meaning based on the definition of "franchise" in Section 1(b) of the Dealer Franchise Act, 15 U.S.C. § 1221(b). (A. 1a; references to "A. " are to pages of the separate appendix to this petition.)

3. Under a floor-plan arrangement, a financial institution lends money to a dealership for the purchase of cars. When a car is sold, the dealership has a duty to remit to the financial institution out of the proceeds of the sale the loan amount attributable to the car sold.

good will of the public toward Ford and its products. (JA 1144-46, 1206-08) [4]

Because Ford's success is thus dependent upon the performance of its franchised dealers, Ford takes pains to assure that each of its dealers will have a strong competitive posture in the marketplace. To this end, Ford includes in its standard franchise agreement provisions which obligate the dealer to maintain adequate physical facilities at an approved location, and to meet various other requirements deemed necessary by Ford to a healthy and competitive operation. (JA 1158-63, 1219-27) A prospective dealer sometimes applies for a franchise before being ready for full compliance with the terms of the standard franchise agreement. Thus, for example, an applicant might not be in a position to provide at the outset fully adequate physical facilities. In such a case, Ford may grant the franchise upon the dealer's express collateral commitment to upgrade his facilities to meet standard requirements within a specified period of time.

In addition, Ford accepts a franchise application only when the principals involved in the ownership and management of the prospective dealership will be capable, in Ford's view, of achieving competitive success. (JA 1144-47, 1206-09) This means that the principals must possess not only sufficient investment capital, but also automobile dealership experience and skill.

A Significant Perspective

The specific facts in this case should be considered from a perspective broader and more generally significant than that of a dispute between automobile manufacturer and dealer. The issues here relate to the ability of automobile manufacturers to compete aggressively with each other,

4. References to "JA " are to pages of the Joint Appendix submitted by the parties on appeal of the district court judgment to the Tenth Circuit.

through franchised dealers, in the consumer marketplace. If the Dealer Franchise Act is applied to shelter those dealers from pro-competitive franchise requirements, the results will be both to inhibit inter-brand competition in the automobile industry and to precipitate substantial changes in automobile franchising detrimental to the interests of independent dealers whom the act was designed to protect.

Events Preceding Ford's Grant of a Franchise to Colonial

In the 1930's, Ford granted C. B. Petty a dealership franchise in Salt Lake City. For thirty years thereafter, the Ford dealership remained in the hands of members of the Petty family. In 1966, the franchise was assigned to a newly-formed corporation named Petty Ford, Inc. At the time Ford approved the assignment, it was represented to Ford that LeGrande L. Belnap ("Belnap"), who had married a member of the Petty family, was acquiring a 51% ownership interest in the dealership. (JA 1637-38)

However, contrary to that representation, Belnap did not at that time actually acquire any ownership interest in the dealership.[5] Nevertheless, as president of Petty Ford, Inc., he claimed the right to direct the dealership's affairs. The Pettys disputed this claim, sought to interfere with Belnap's control of the business, and claimed that Belnap had breached agreements he had made with them.

Having had no previous experience in the operation of an automobile dealership, Belnap relied principally on general

5. Belnap testified at trial that he was not a 51% - owner of Petty Ford, Inc. before June 1969. See Trial Transcript, pp. 447, 450. This Court may wish to take judicial notice of Amended Findings of Fact of the Third District Court of Salt Lake County, State of Utah in *Colonial Ford, Inc. v. Petty*, Civ. No. 199867, filed November 15, 1977. That court found that (i) the 1966 agreement between Belnap and a Petty family partnership under which Belnap was to receive 51% of the dealership assets was never consummated, and (ii) between 1966 and June 1969 the dealership was owned by the Petty family partnership, although its business was controlled and directed by Belnap.

managers for daily operation. Between 1966 and 1969 the business of the dealership steadily deteriorated. Belnap's efforts to control dealership affairs met with continued interference by the Pettys, and they blocked his plans to expand or relocate. Sales volume and profitability declined, and the dealership's market penetration fell from parity with the competing Chevrolet dealer to two-thirds of that Chevrolet dealer's market share. (JA 1637-40)

Ford representatives recommended that management be strengthened and that adequate facilities at a more favorable location be acquired to replace the outmoded ones then in use. Although concurring with these recommendations, Belnap told Ford that they could not be implemented without cooperation from the Pettys, which was not forthcoming.[6] However, Belnap repeatedly assured Ford that he was trying to achieve peace with the Pettys, and that once he did so he would be able to take necessary corrective actions.

Early in 1969, Belnap hired Marshall Pease ("Pease") as general manager. Pease, who was recommended to Belnap by Ford, had been engaged for many years in the management of other Ford dealerships. Under Pease's management, the dealership's sales increased over sales during the same period of the prior year. However, dissension and conflict between Belnap and the Pettys continued unabated, and litigation between them erupted in the Utah courts. Paralyzed by the conflict, the dealership was unable to move toward relocation or the construction of adequate physical facilities. In May 1969, Ford duly notified the dealership that its franchise agreement would be terminated pursuant to its terms. (JA 1637-40, 1137-38)

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6. In a June 1969 letter to Ford (JA 1434-43), Belnap wrote:

> "There has never been a question but what a new facility will increase sales and profitability, and this has been the subject of many letters to the Petty family in an attempt to acquire a new facility at a strategic location."

Upon receipt of Ford's notice of termination, Belnap conferred with Ford representatives to devise a plan for future Ford representation in the Petty Ford locality. Belnap was told that his opportunity to be part of that representation would depend upon his ability to persuade Ford that operation and ownership would be free of dissension.

Belnap consequently planned to buy out the Pettys. Ford representatives told him that, if he did buy out the Pettys, a franchise would be granted only if (1) Pease was designated as the manager of the new dealership and given the opportunity to obtain an equity interest,[7] and (2) the dealership would agree to relocate to new and adequate facilities.

After learning of Ford's conditions, Belnap purchased 51% of the existing dealership, making his first substantial capital investment in the business,[8] and he entered into an agreement, subject to Ford's approval, to purchase the remaining interest of the Pettys. (JA 1444-54)

Immediately after making these arrangements with the Pettys, Belnap proposed that Ford grant a franchise to an entity to be owned wholly by himself. Belnap represented to Ford that (i) it was his intention that Pease would manage operations of the dealership and later receive a 49% equity interest, and (ii) the dealership would begin

7. Belnap testified at trial, and the Court below found, that Ford wanted him to give Pease "absolute control." (A. 18a) It is clear, however, from the terms of the contract which Belnap and Pease subsequently signed, and which Ford accepted, that Ford's concern related to operating management, not "absolute control." The agreement provided that Pease was to receive a 49% minority interest in the dealership, and was to be "in charge of operating the franchise dealership . . . [with] authority to carry out all rights, duties and obligations in connection thereto *with respect to the daily operation*." (JA 1139-41) (Emphasis supplied.) This provision was drafted by Belnap's counsel with the specific purpose of establishing that Pease was not to have "sole control." (JA 397)

8. Belnap's testimony that he had "other money in Petty Ford" prior to the time he purchased his 51% interest (JA 171-72) apparently refers not to an equity investment but to an $85,000 loan. (JA 1448; Trial Transcript, p. 144)

construction of facilities at a new location as soon as possible.[9] (JA 1442)

Ford was willing to replace the Belnap-Petty dealership with a Belnap-Pease dealership. However, Ford informed Belnap that it would approve the buy-out of the Pettys' remaining interest and franchise the new entity only if Belnap first took concrete action to fulfill the conditions which he had agreed to. Pease, unlike Belnap, was a "car man," and Ford declined to enter into the new franchise relationship until Pease became a part-owner of the franchisee. Ford also insisted that the new entity agree that, if franchised, it would acquire adequate physical facilities.

Belnap organized a new corporation, Colonial, to apply for the new Ford franchise. He entered into a management and buy-in agreement with Pease.[10] Colonial then submitted to Ford a prospective dealer application containing a written commitment that Colonial would acquire adequate dealership facilities by July 1, 1970. (JA 1430) Satisfied that both its conditions had been met, Ford accepted Colonial's dealership application. On September 2, 1969, Colonial became a franchised Ford dealer under a franchise agreement to expire September 15, 1971.

Events Following the Grant of a Franchise to Colonial

From the time Colonial commenced operations, Belnap, on its behalf, communicated frequently with Ford representatives regarding acquisition of new dealership facilities. Yet Colonial failed to fulfill its commitment to secure new facilities by July 1, 1970. When Colonial's first

9. According to his testimony at trial, Belnap did not want either of these things to be done, but made the representations in order to induce Ford to accept his proposal. (JA 172-76)

10. Belnap agreed to sell Pease 49% of the stock of Colonial in return for $20,000 in cash and a $200,000 note payable from Pease's share of future profits. It was formally agreed that Pease would manage Colonial's daily operations.

franchise agreement expired in September 1971, Colonial still had only its old facilities. Ford nevertheless entered into a second franchise agreement with Colonial to expire in September 1972, with a warning that it would not again renew unless Colonial took firm steps to relocate to an adequate facility.

In July 1972, Colonial arranged to acquire an appropriate site for relocation, and, in August 1972, was granted a franchise for an indefinite term. Colonial constructed dealership facilities on its newly acquired site, and moved there in the Autumn of 1973.

During the first eight months of 1974, Colonial's annualized net profits, sales volume, and market penetration all increased. However, Colonial was short of working capital to handle its expanded business. Neither Belnap nor Pease added working capital, but instead caused Colonial to violate the terms of its floor-plan financing arrangement and assume an "out-of-trust" position. That is, Colonial failed to remit the money due to its floor-plan creditor, Ford Credit, each time it sold a vehicle; instead, Colonial converted proceeds of such sales to its own use for working capital. (JA 508-09)

Aware of Colonial's working capital shortage, Ford urged Belnap and Pease to add approximately $200,000. But neither of Colonial's owners would add working capital by loan or any other means; instead, they simply continued to use Ford Credit's money to operate the dealership.

In August 1974, Ford Credit learned that the dealership was substantially "out of trust" under the floor-plan arrangement. By September 1974, the condition had worsened, and Ford Credit suspended Colonial's floor-plan credit line. During this period, Belnap took over operating management from Pease, and reacquired Pease's Colonial stock without compensation. Belnap then gave the stock to his wife.

Without a credit line, Colonial failed to obtain sufficient inventory, and its profitability drastically declined. Ford Credit offered to lend Colonial funds for working capital and to reestablish Colonial's credit line, if Belnap and his wife would invest an additional $150,000 in the dealership. The Belnaps failed to do so.[11] Instead, on May 15, 1975, Colonial brought this action against Ford and Ford Credit.

Prior Proceedings

Colonial sued in the United States District Court for the District of Utah, Central Division, alleging violations by Ford of Section 1 of the Sherman Act and of the "good faith" provision of the Dealer Franchise Act.[12] Ford was alleged, among other things, to have wrongfully imposed management and adequate-facilities requirements at the time Colonial was franchised. The jury returned a verdict for Ford on the Sherman Act claim and against Ford in the amount of $210,000 on the Dealer Franchise Act claim.

Ford appealed to the United States Court of Appeals for the Tenth Circuit, urging that the evidence at trial was insufficient to support the verdict. In affirming, the Tenth Circuit held that the verdict was adequately supported by evidence that Ford, as a condition for granting the franchise, required Belnap to agree to sell Pease a 49% interest in Colonial, and required Colonial to commit itself to relocate to new and adequate facilities.[13]

11. A joint personal financial statement submitted by Belnap and his wife to Ford Credit in July 1973 showed their net worth to be in excess of $3,000,000. (JA 1281-82)

12. Other claims included in Colonial's complaint were withdrawn or dismissed before the case was submitted to the jury. With respect to the Dealer Franchise Act claim, the jurisdiction of the district court was invoked under Section 2 of the Act, 15 U.S.C. § 1222. (A.2a)

13. The Court erroneously failed to distinguish between requirements imposed on Belnap and requirements imposed on Colonial. The Dealer Franchise Act applies *only* to relationships between a manufacturer and an "automobile dealer" (a defined term under the Dealer Franchise Act, 15 U.S.C. § 1221 (c), A. 2a), in this case, Colonial. Belnap was never an "automobile dealer."

With respect to the adequate-facilities commitment, the Tenth Circuit's original opinion simply found without support that it was improper for Ford to require and enforce it. With respect to the buy-in requirement, the Court took the position that it was a mere device whereby Ford gave Pease a "free ride" to a 49% interest in a large dealership.[14] According to the opinion, the buy-in caused a shortage of working capital, and the shortage of working capital in turn caused a slowing of operations with attendant loss of profit. The critical link in this chain of causation, attribution of the shortage of working capital to the buy-in, was a creation of the Tenth Circuit, and was without support in the trial record.[15]

Ford petitioned the Tenth Circuit for a rehearing, urging that the Court had erred in applying the Dealer Franchise Act to the imposition of conditions precedent to the grant of a franchise. Granting Ford's petition, the Tenth Circuit delivered a second opinion, "clarifying" its first opinion and again granting judgment in Colonial's favor.

Focusing on the buy-in requirement, the Court emphasized its view that Pease was wrongfully given a "free-ride" by Ford, and ignored Belnap's testimony that Ford

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14. The record is totally inconsistent with the Tenth Circuit's characterization of the buy-in arrangement as a "free ride." Pease obligated himself to pay $220,000, plus interest at 8%, for the stock he received from Belnap. All his stock was pledged to Belnap to secure this obligation. While he owned the stock, Pease used most of the dividends he received to pay interest and principal to Belnap. And, as noted above, Pease received no compensation when Belnap reacquired his stock.

15. The Tenth Circuit's theory was essentially that (i) Pease was incapable financially of providing Colonial with additional working capital when the need arose, and (ii) inferentially, Belnap would not do so because of Pease's part-ownership. (A.12a) However, the opinion did not come to grips with the facts that (i) as soon as Belnap realized the acuteness of the danger to the dealership, he reacquired Pease's stock without compensating Pease, yet still failed to make a capital infusion, and (ii) even while Pease was part-owner, Belnap could have infused working capital by way of a loan without giving Pease any equity interest in the infusion.

required the buy-in because it wanted a "car man" in management.[16] The opinion concluded that Belnap carried out the buy-in requirement only to "protect his investment," despite the fact that Belnap owned no equity interest in the dealership until *after* Ford told him that the buy-in would be required.[17] Moreover, the Court did not reconcile the fact that the buy-in was completed *before* the franchise was granted with the fact that the Dealer Franchise Act covers only *post*-franchise conduct by an automobile manufacturer. No post-franchise conduct of Ford in connection with the buy-in was even suggested in the opinion.

REASONS FOR GRANTING THE WRIT

This Court has never granted certiorari in a Dealer Franchise Act case, and has never rendered a decision interpreting that statute. This petition should be granted because the Tenth Circuit's decision, in conflict with decisions in three other circuits, places an interpretation on the Dealer Franchise Act that would have a significant adverse effect on competition and franchising in the automobile industry.

First, the Tenth Circuit interpreted the Dealer Franchise Act so as to prevent an automobile manufacturer from requiring its franchised dealers to provide physical facilities adequate for effective competition with dealers in other makes of car. This interpretation sets the Dealer

16. The equity interest obtained by Pease through the buy-in gave him an incentive to remain with the dealership and make it a success. As Pease told Ford, he had been unable to obtain an equity interest in the dealership he had managed previously, and he was interested in working for Belnap only if he could obtain such an interest. (JA 1454) Thus, the conclusion of the Tenth Circuit that Ford had no "legitimate interest" in the "ownership" (as opposed to "management") of Colonial (A. 19a) is inconsistent with the record.

17. Belnap testified that (i) Ford representatives told him in May or June 1969 of Ford's buy-in requirement, and (ii) after this, at the very *end* of June 1969, Belnap *first* made an equity investment in the Petty Ford dealership. (JA 165-76; Trial Transcript, pp. 447, 450)

Franchise Act at cross-purposes with the basic pro-competitive philosophy of the antitrust laws, as recently elucidated by this Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) ("*Sylvania*"). The decision is also in direct conflict with the decisions of three other circuits, which have interpreted the Dealer Franchise Act to permit such pro-competitive requirements.

Second, the Tenth Circuit applied the Dealer Franchise Act to prohibit an automobile manufacturer from selecting its dealers in a manner calculated to maximize competition in the marketplace. It did this by holding Ford liable for insisting that ownership and management of a prospective dealer, Colonial, include a person possessing qualifications of experience and skill believed by Ford to be essential for effective competition by the franchisee.

Third, the Tenth Circuit's interpretation of the Dealer Franchise Act in the respects described above could well cause automobile manufacturers to adopt policies and practices that would have detrimental effects on independent businessmen.

I.

THE DECISION OF THE TENTH CIRCUIT WOULD HAVE AN ADVERSE EFFECT ON COMPETITION AND FRANCHISING IN THE AUTOMOBILE INDUSTRY.

Adequate Facilities

The Tenth Circuit held that the Dealer Franchise Act, a "supplement" to the antitrust laws,[18] paradoxically prohibits an automobile manufacturer from enforcing a contractual commitment by a dealer to provide physical

18. The official title of the Dealer Franchise Act is "An Act to supplement the antitrust laws of the United States . . . ." Pub. L. No. 1026, c. 1038, 70 Stat. 1125 (1956) (A. 1a). *See also* 15 U.S.C. § 1224. (A. 3a)

facilities deemed adequate for effective competition against dealers in other makes of car.[19]

That holding is philosophically antagonistic to the competitive objectives of the antitrust laws as recently elucidated by this Court in *Sylvania*. In that case, this Court expressly recognized the vital importance of dealer strength in the arena of inter-brand competition, which was also recognized to be the primary antitrust objective. In *Sylvania*, it was held that even substantial restrictions on dealers' *intra-brand* competitive efforts might be justified where those restrictions aided competitive effort in the *inter-brand* market. Thus, this Court said:

> "Established manufacturers can use them [vertical restrictions] *to induce retailers* to engage in promotional activities or *to provide service and repair facilities* necessary to the efficient marketing of their products. Service and repair are vital for many products, such as *automobiles* and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the *competitiveness* of his product." 433 U.S. at 55. (Emphasis supplied.)

The inconsistency between the Tenth Circuit's holding and the philosophy reflected in *Sylvania* is readily apparent. Here, the Tenth Circuit has held *impermissible* enforcement of a *contractual* requirement that the dealer provide facilities adequate for competitive marketing of the manufacturer's products.[20] In *Sylvania*, this Court held that a dealer might *properly* be induced to provide such

19. The Court below found that Ford's requirement, as a condition for granting the franchise, that the "place of business be changed to a new location with new facilities" was one of two examples of violation of the Dealer Franchise Act that the jury was properly permitted to find. (A. 10a)

20. The relationship between the required facilities and the dealer's competitive effectiveness is empirically supported. After Colonial moved to its new facilities in 1973, its share of the automobile market in the geographic area it served increased substantially. (JA 1459-73)

facilities even by imposition on dealers of *vertical restrictions*.

It is clearly fundamental to an automobile manufacturer's ability to compete and to survive economically that it be permitted to require its dealers to provide the physical means to represent the automobile manufacturer in the marketplace effectively and competitively. In that context, the Tenth Circuit's decision poses a serious threat to automobile manufacturers. Actions taken by them to meet the threat could have detrimental effects on many independent businessmen.

First, automobile manufacturers might eschew franchise relationships with dealers who were not able immediately to provide adequate physical facilities. There would be reluctance to rely upon a commitment that such facilities would be provided after commencement of the franchise relationship, lest later enforcement of the commitment be deemed a violation of the Dealer Franchise Act. A potential dealer of ability and experience, who nevertheless does not have adequate facilities in place in the franchise locality, could be disqualified or at least disadvantaged in his quest for a franchise.

Second, prohibiting automobile manufacturers from enforcing adequate-facilities requirements would give them incentive to take steps toward vertical integration, at least in key locations, eliminating *pro tanto* the role of independent businessmen. This Court's observation on such a possibility in the parallel context of *Sylvania* is equally applicable here:

> "We also note that *per se* rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration

into the distribution system, thereby eliminating to that extent the role of independent businessmen." 433 U.S. at 57, n.26.[21]

Selection of Dealers

The Tenth Circuit cited the requirement that Pease be permitted to buy into the dealership as one of two examples of requirements which the jury could have found to evidence a violation of the statutory duty of "good faith." (A. 10a) The Court found a violation of the Dealer Franchise Act in imposing this requirement because it "carried over" into the post-franchise period. (A. 10a, 20a)

The buy-in requirement "carried over" only in the sense that Colonial's corporate structure continued during the franchise period. However, the buy-in requirement was completely fulfilled before the franchise was granted, and was in its essence an exercise of Ford's right to select a franchisee with whom it wished to deal. That right is critical to a manufacturer's ability to insure that its dealers will be qualified to compete vigorously and effectively with dealers representing the manufacturer's competitors.

In the present case, the record shows that Ford believed, when it granted the franchise to Colonial, that Belnap possessed the financial resources, but not the managerial experience and skill, to operate a competitive dealership. Ford's insistence on equity participation by a manager of proven competence and experience reflected its concern that

21. Mr. Justice Stewart, in his separate opinion in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 387 (1967), expressed a similar concern:

> "Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force 'suppliers to abandon franchising and integrate forward to the detriment of small business. . . .' *Standard Oil Co.* v. *United States*, 337 U.S. 293, 315 (separate opinion of Mr. Justice Douglas)." (Footnote omitted.)

its new dealer be capable of reestablishing Ford's competitive position in the dealership locality.[22]

This Court has long upheld the right of a manufacturer freely to select its representatives in the marketplace. As stated in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), there is a

> "long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

As in *Colgate*, moreover, this right exists even when a manufacturer uses his freedom to select dealers as a means of furthering such a non-competitive objective as resale price maintenance. In *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960), it was explained that a unilateral refusal to do business with a dealer for an anti-competitive purpose is lawful under *Colgate* because the "countervailing consideration" of allowing a manufacturer freedom to select its dealers outweighs even anti-competitive effects.

Here, no anti-competitive effect of Ford's requirement of equity participation by Pease was even postulated by the Tenth Circuit. And that Court totally ignored Ford's objective to involve a "car man" in the dealership and thus *enhance* competition in the marketplace. As the Ninth Circuit has held,

> "a manufacturer may discontinue a relationship, or refuse to open a new relationship for business reasons which are sufficient to the manufacturer . . . . Where . . . a supplier seeks no more than a better equipped and more aggressive distributor for his product, *his conduct may in fact be more beneficial than detrimental to competition* . . . ."

22. Ford's manner of dealing with Belnap's franchise application, in this respect, was essentially the same as Ford's manner of dealing with the franchise application of any principal investor who lacks automobile dealership experience.

> *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211 at 1214-15 (1970), *cert. denied*, 401 U.S. 939 (1971). (Emphasis supplied.)

Similarly, in *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425, 430, *cert. denied*, 371 U.S. 829 (1962), the Second Circuit construed the Dealer Franchise Act to permit an automobile manufacturer to reject franchise applicants lacking qualifications believed by the manufacturer to be necessary for competitive success:

> "[A] manufacturer may refuse to accept a person as a dealer because of an honest belief that the prospective dealer lacks either the ability or the financial resources to be a successful dealer."

The Dealer Franchise Act was not intended to govern the process of dealer selection; that is evident not only from its terms,[23] but also from the remedial purpose which it was designed to serve. As this Court noted in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 99 S. Ct. 403, 407, n.4 (1978), the Dealer Franchise Act was enacted to protect from coercion a dealer who had *already* entered a franchise relationship with a manufacturer, and consequently was seen by legislators as an "economic captive" of the manufacturer.

No comparable legislative purpose is implicated in the process of dealer selection. Application of the Dealer Franchise Act to curtail the freedom of a manufacturer to require participation of a qualified principal in a prospective dealership would inhibit procurement of a competitive dealer body without promoting any policy underlying the statute.

Nor would such application of the Dealer Franchise Act benefit the independent businessmen seeking franchises.

23. By its terms, the Dealer Franchise Act imposes an obligation of good faith "in performing or complying with," or in terminating or failing to renew, an existing franchise. 15 U.S.C § 1222. (A. 2a)

Automobile manufacturers would be deterred from encouraging would-be investors, lacking automobile dealership experience, to obtain partners who could supply that qualification. Since such an initiative might subject the manufacturer to a Dealer Franchise Act claim similar to the one asserted here, the franchise applications of such inexperienced would-be investors would simply be rejected to avoid the risk.

II.

THE DECISION OF THE TENTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS IN THREE OTHER CIRCUITS.

The decision of the Tenth Circuit is not merely, as shown above, in conflict with the philosophy of *Sylvania* and with the objectives of antitrust, but it is also in conflict with decisions in three other circuits. Those three circuits decided the question of the propriety of an adequate-facilities requirement in a manner that will enhance, rather than curtail, competitive activity.

THE TENTH CIRCUIT DECISION

Colonial made a contractual commitment to Ford, as a condition of the franchise grant, that it would relocate to adequate new facilities. The Tenth Circuit held that requiring the commitment "before a franchise would be given", and subsequently enforcing it, were sufficient to "show a violation of the Dealer Act." (A. 10a)

While the Court below correctly noted that the jury was instructed that Ford could properly impose "reasonable standards as to facilities" (A. 11a), there is no suggestion in its opinion that the jury could have found that Ford had imposed unreasonable standards.[24]

24. The Court below noted that the jury could have found a "causal connection" between the "size or cost of the new location and facilities" and the "liquidity problem." (A. 13a) However, such a causal relationship would have existed whether the "standards as to facilities" were

Thus, the Tenth Circuit held that the Dealer Franchise Act can be applied to prohibit an automobile manufacturer from reasonably enforcing a pre-franchise contractual commitment to provide adequate facilities. This holding is in direct conflict with the holdings in three other circuits.[25]

CONFLICTING DECISIONS IN OTHER CIRCUITS

Fifth Circuit

In *Woodard v. General Motors Corp.*, 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962),[26] a dealer charged General Motors with violating the Dealer Franchise Act by terminating his Chevrolet franchise. The franchise agreement had included an adequate-facilities provision. It was understood at the time the franchise was granted that General Motors regarded as inadequate the facilities with which the dealer would begin operations. The dealer, however, promised that he would relocate at an early date. The dealer failed to relocate; General Motors pressed the dealer to keep his promise without success; and General Motors gave notice of termination. The dealer sued.

The Fifth Circuit affirmed summary judgment for General Motors, upholding the legality of the requirement of an adequate-facilities commitment as a condition for granting a franchise:

> "An automobile manufacturer is not precluded by the [Dealer Franchise] Act from including in its contracts with dealers . . . requirements that dealers shall provide product representation commensurate

"reasonable" or not, if the owners refused, as they did here, to add needed working capital.

25. The holding appears to conflict even with a prior holding in the Tenth Circuit. *See Salco Corp. v. General Motors Corp., Buick Motor Div.*, 517 F.2d 567 (1975).

26. *See Victory Motors of Savannah, Inc. v. Chrysler Motors Corp.*, 357 F.2d 429 (1966); *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571-73 (1978), *cert. denied*, 99 S. Ct. 1218 (1979).

> with the good will attached to its trade name and facilitate the proper sale and servicing of its motor vehicles. The manufacturer is entitled to bargain for the protection of its good name, to provide for the trade acceptance of its wares, *and to have a reasonable expectation that those who are marketing its cars have the facilities for coping with the sales efforts of those who are dealing in the products of competitors.*" 298 F.2d at 128. (Emphasis supplied.)[27]

The Fifth Circuit also clearly held that under the Dealer Franchise Act an automobile manufacturer may properly insist after the franchise is granted that the commitment be fulfilled. The Fifth Circuit said, in words peculiarly applicable to the circumstances here:

> "It was known by the appellants prior to the execution and delivery of the agreement that the appellee regarded the Stonewall Street premises as unsuitable and inadequate. Before, at the time of, and subsequent to the execution and delivery of the contract the appellants promised to procure a satisfactory and adequate location for the Chevrolet dealership. *The efforts of the appellee in seeking compliance with these undertakings were consistent with and in the enforcement of the contractual obligations of the appellants.*" 298 F.2d at 129. (Emphasis supplied.)

Seventh Circuit

In *Ed Houser Enterprises, Inc. v. General Motors Corp.*, [1979-1] Trade Cas. (CCH) ¶ 62,505 (7th Cir. 1978), the dealer alleged that General Motors had violated the Dealer Franchise Act by threatening non-renewal of its franchise

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27. It may be noted that the Tenth Circuit did not even address the question of competitive "coping" or the relationship between an adequate-facilities requirement and inter-brand competition.

if it failed to construct new dealership facilities. The Seventh Circuit affirmed summary judgment in favor of General Motors.

The circumstances in *Ed Houser* were strikingly similar to those in this case. Mr. Ed Houser was an officer of a General Motors dealership having physical facilities considered unsatisfactory by General Motors. Mr. Houser proposed to General Motors that his company, Ed Houser Enterprises, Inc., replace the existing dealership. General Motors agreed, and entered into a standard General Motors franchise agreement with the new dealer. The new franchise was granted upon the express collateral agreement that the franchise would not be renewed unless the dealer constructed new, adequate dealership facilities within a specified time.

The Court upheld General Motors' right under the Dealer Franchise Act to enforce the pre-franchise commitment:

> "It cannot be said . . . that the defendant threatened or coerced or intimidated the plaintiff to provide new facilities when the basis of the agreement required such a commitment on the part of the plaintiff." [1979-1] Trade Cas. ¶62,505 at 76,937.

The Court cited *Woodard* for the proposition that

> "an automobile manufacturer is not precluded by the [Dealer Franchise] Act from requiring its dealers, pursuant to the contract between them, to provide facilities . . . *adequate to compete with dealers in products of the manufacturer's competitors.*" *Id.* (Emphasis supplied.)

Third Circuit

The Third Circuit has reached the same result. In *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963),[28] a dealer sued Ford for violating the Dealer Franchise Act, claiming that Ford had improperly terminated the dealer's franchise for failure to fulfill a commitment to maintain adequate facilities. Despite a jury verdict for the dealer, the district court entered judgment for Ford. The Third Circuit affirmed.

As in the present case, the dealer in *Milos* applied for a Ford franchise at a time when it did not yet have physical facilities that met Ford's standards. While the application was pending, the then prospective dealer wrote Ford, acknowledging that the existing facilities were inadequate, and agreeing to secure suitable facilities within two years if the franchise were granted. Shortly after this commitment was received, Ford granted the franchise.

Following the grant of the franchise, the dealer failed to obtain new facilities. Ford pressed the dealer to do so but the dealer resisted, and Ford finally terminated the franchise. The Court held that Ford acted properly in pressing the dealer to expand its facilities, and rejected the dealer's claim that the Dealer Franchise Act precluded enforcement of the adequate-facilities commitment:

> "With respect to the adequacy of plaintiff's facilities, it will be recalled that [plaintiff] himself acknowledged this deficiency and the first franchise was granted only after he promised to remedy it within two years. Thus . . . it is a case of one party to a contract freely entered into requiring the other party to perform. *An attempt to enforce an unambiguous contractual obligation, under these circumstances, can hardly be said to constitute coercion or intimidation.*" 317 F.2d at 717-18 (Emphasis supplied.)

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28. *See Globe Motors, Inc. v. Studebaker - Packard Corp., 328 F.2d 645 (1964); Garvin v. American Motors Sales Corp.*, 318 F.2d 518 (1963); *Kaiser v. General Motors Corp. (Pontiac Motor Div.)*, 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd mem.*, 530 F.2d 964 (1976).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

June 5, 1979

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1818

FORD MOTOR COMPANY, a Delaware Corporation,
Petitioner,

v.

COLONIAL FORD, INC., a Utah Corporation, *et al.*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Automobile Dealer Franchise Act

Pub. L. No. 1026, c. 1038, 70 Stat. 1125

(Approved August 8, 1956)

AN ACT

To supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise automobile dealers to bring suit in the district courts of the United States to recover damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[15 U.S.C. §1221]

That, as used in this Act—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

[15 U.S.C. §1222]

SEC. 2. An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after the passage of this Act to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in

defense of any such action the failure of the dealer to act in good faith.

[15 U.S.C. §1223]

SEC. 3. Any action brought pursuant to this Act shall be forever barred unless commenced within three years after the cause of action shall have accrued.

[15 U.S.C. §1224]

SEC. 4. No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

[15 U.S.C. §1225]

SEC. 5. This Act shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this Act and an express provision of State law which can not be reconciled.

Original Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 76-2079, 76-2080 and 76-2083

COLONIAL FORD, INC., a Utah Corporation,
Plaintiff, Appellee, Cross-Appellant,

v.

FORD MOTOR COMPANY, a Delaware Corporation,
Defendant, Appellant,

and

FORD MOTOR CREDIT COMPANY, a Delaware Corporation,
Defendant, Appellant, Cross-Appellee

(Argued March 17, 1978; Decided May 31, 1978)

Peter W. Billings, Jr., Salt Lake City, Utah *(Peter W. Billings, Stanford B. Owen, Ted D. Smith, Fabian & Clendenin*, Salt Lake City, Utah, *with him on brief)*, for defendant, appellant, Ford Motor Company.

Harold G. Christensen, Salt Lake City, Utah *(R. Brent Stephens, Snow, Christensen & Martineau*, Salt Lake City, Utah, and *George V. Burbach*, Dearborn, Mich., *of counsel, with him on brief)*, for defendant, appellant, cross-appellee, Ford Motor Credit Company.

Daniel L. Berman, Salt Lake City, Utah *(Richard W. Giauque*, and *Gordon Strachan*, of *Berman & Giauque*, Salt Lake City, Utah, *with him on brief)*, for plaintiff, appellee, cross-appellant, Colonial Ford, Inc.

Before SETH, Chief Judge, and DOYLE and McKAY, Circuit Judges.

SETH, Chief Judge.

Colonial Ford, Inc. brought this action against Ford Motor Company and Ford Motor Credit Company. There

were several causes of action alleged in the complaint; however, only two were submitted to the jury. These were a cause under Section 1 of the Sherman Act, and the second was under the Automobile Dealer Franchise Act, 15 U.S.C. § 1221.

The plaintiff corporation had been a Ford dealer in Utah, and during most of the time here concerned, it was owned by LeGrande Belnap, as the principal owner, and by Marshall Pease who had a contract to buy a forty-nine percent interest from Mr. Belnap.

The defendant, Ford Motor Credit Company, is a wholly-owned subsidiary of Ford Motor Company, and provides financing to Ford dealers for cars and real estate. It also provides financing to a much lesser extent for undertakings not related to the automobile business. It had provided the financing for cars purchased by Colonial from Ford Motor, the floor planning, and financed the building of a new facility for Colonial, taking back a deed of trust on the real estate. The defendant Ford Motor Credit counterclaimed to recover the amounts asserted to be due from Colonial on the floor-plan agreement, together with related accounts, and to accelerate the amounts due under the real estate loan because of Colonial's failure to pay installments.

The trial court, before trial, issued an injunction against both defendants to prevent (1) a foreclosure under Ford Credit's deed of trust; (2) repossession of the floor-planned cars, and (3) to require the continuation of the previous floor-plan credit arrangement to provide for the purchase of cars from Ford Motor during the litigation.

The two causes of action were submitted to the jury, and the jury found for Colonial Ford against Ford Motor Company, only, on the Automobile Dealer Franchise Act claim in the amount of $210,000.00. The jury found for the defendant Ford Credit on the Dealer Act claim against it, and for both defendants on the Sherman Act cause. The jury also answered several special interrogatories.

Shortly after trial the court terminated the injunction as to the floor-planned cars in Colonial's possession, and permitted Ford Credit to repossess the new and used car inventory. The court also authorized Ford Credit to stop floor-plan financing which had been continued under the injunction. The injunction was however continued to prevent Ford Credit from foreclosing on its deed of trust, and also from executing on its judgment of $2,897,125.22 for balances due from Colonial entered on its counterclaim.

All parties have appealed. The plaintiff's points on appeal relate to the Automobile Dealer Franchise Act cause of action, and to the real estate acceleration issue. Thus Colonial urges:

> 1. There was coercion by Ford Motor under the Dealer Act.
> 2. The coercion caused Colonial to have liquidity problems and a lack of working capital.
> 3. Ford Credit is subject to the Dealer Act as a matter of law, and such issue should not have been submitted to the jury.
> 4. The instructions were erroneous as to the application of the Dealer Act to Ford Credit.
> 5. The trial court erroneously determined that there was no waiver by Ford Credit of the acceleration provisions of the real estate financing agreement.

Ford Motor Company urges in its appeal that the court's interpretation of the Dealer Act and instructions given the jury on the Act were erroneous especially as they concerned good faith and "wrongful demands." It also argues that the jury should not have been permitted to consider the acts of Ford Credit in the application of the Dealer Act to Ford Motor. Ford Motor also urges that there was no valid evidence of damages.

Ford Credit argues that it was error to continue the injunction preventing foreclosure pending appeal.

As mentioned above, the plaintiff urges that the Automobile Dealer Franchise Act, 15 U.S.C. § 1221, was applicable to Ford Motor Credit Company as a matter of law. This argument is centered on the fact that Ford Credit is a wholly-owned subsidiary of Ford Motor, and was floor-planning the cars purchased by plaintiff Colonial from Ford Motor.

The Dealer Act is directed to manufacturers, to assemblers, and to distributors of automobiles. It is further directed to the performance or termination of the franchise agreement between those so engaged and the dealers.

It is apparent from the record that Ford Credit is not a manufacturer, assembler, or distributor, and further that it had no franchise agreement with plaintiff. Thus on the face of the Act, it was not applicable to Ford Credit. *See Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59 (9th Cir.); *Lawrence Chrysler Plymouth, Inc. v. Chrysler Corp.*, 461 F.2d 608 (7th Cir.); *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir.). The Act also includes any other entity ". . . which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." 15 U.S.C. § 1221(a). The "acts for" or "under the control" provisions must relate to the transactions or circumstances out of which the cause of action arose. Testimony and evidence must develop these factors in each case, and the "control" must be shown to be in connection with the "distribution" of automobiles. Referring to these elements of the statute as "control," it is apparent under the Act that the development during trial is directed to actual and to practical considerations there existing. This must be the description of a fact question in ordinary circumstances, and was such a matter here. The examination of several witnesses was directed to this issue, and especially in the questioning of the official of Ford Credit who made the decision to terminate the floor planning, Mr. Thomas. The "under control"

and "acts for" elements here created a fact issue for submission to the jury. The wholly-owned subsidiary aspect was certainly a factor or an opportunity, but in the abstract it could not be a determining factor. The plaintiff centers on the financing of cars purchased from Ford Motor as part of distribution, but this is not persuasive as this position was shown to be no different from that occupied by the local bank which had previously floor-planned for plaintiff.

We find no error in the instructions given to the jury on the Dealer Act application to Ford Credit. The statutory elements were covered in the instructions, and contrary to plaintiff's arguments the acts must be directed to the franchise as above pointed out. This was covered by the instructions and necessarily related to the parties to the franchise agreement.

The fact question was thus properly submitted to the jury, and it decided it. In answer to special interrogatories, the jury responded that Ford Credit had not failed to act in good faith in its business relations with Colonial under the Act. Also it replied that the acts of Ford Credit did not prevent or make it more difficult for Colonial to meet its financial obligations to Ford Credit.

We thus find no error in the submission of the Dealer Act question as to Ford Credit to the jury, and the verdict must stand.

The plaintiff, in reference to the real estate financing, urges that the trial court should not have applied the acceleration provisions of the deed of trust and security agreement. This financing was by Ford Credit, and it is undisputed that installments were not paid by plaintiff when due in the period September 1974 until September 1975, and there was about $130,000.00 past due. In May 1975, Ford Credit sent a notice to plaintiff exercising its right to accelerate under the deed of trust and security agreement. The same month the trial court entered a temporary restraining order, followed by an injunction which

required continuance of the financing as it existed before the termination of floor-planning, which required that Ford Credit take no action to foreclose or repossess, and generally required Ford Credit to carry out its previous financial relationship with plaintiff; thus to continue to extend credit. While this injunction was in effect, plaintiff made some installment payments on the real estate. The trial court stated that the acceptance of such payments, without any satisfaction by plaintiff of the older obligations, did not establish "... a factual premise for the acceptance of waiver claimed by plaintiff." It would seem sufficient to observe that the injunction altered significantly the relationship and obligations of the parties under the deed of trust and the security agreement, and that the trial court could determine the impact of its injunction and his intent in its issuance as to the waiver issue. Thus the trial court's interpretation of the injunction as to this issue must be accepted and is accepted. The matter was then clearly outside normal business relations and outside the voluntary elements of such relations. We find nothing in *United States v. Colombine Coal Co.*, 27 Utah 2d 140, 493 P.2d 983 (Utah), or in *Swain v. Salt Lake Real Estate & Investment Co.*, 3 Utah 2d 121, 279 P.2d 709, to lead to a contrary conclusion.

The order or injunction of the trial court preventing foreclosure by Ford Credit under the deed of trust and preventing execution under its judgment is hereby set aside.

Ford Motor Company in this appeal urges that the trial court misconstrued the Automobile Dealer Franchise Act (15 U.S.C. § 1221), and failed to give certain instructions to the jury and also gave instructions which were erroneous. Ford Motor in this argument asserts that there must be a wrongful demand on the dealer coupled with a threat of reprisal related to the franchise.

Ford Motor first urges that there was no written "franchise" and Colonial was not a "dealer" until September 2, 1969. Thus acts of Ford Motor before that time cannot be a violation of the Dealer Act. However, it is apparent that several of the most significant requirements imposed by Ford Motor as conditions to be met before a franchise would be given were made before that date. It is a sufficient answer that these conditions were carried over into the formal dealership period. Two examples are the requirement that Mr. Pease be given a contract to buy into the dealership when created to the extent of forty-nine percent, and that the place of business be changed to a new location with new facilities. Ford Motor in its brief even refers to the relocation as "an inducement to being granted a franchise." Ford Motor also treats the relocation matter as "contractual."

It is clear from the record that Ford Motor required Mr. Belnap to agree to sell Mr. Pease a forty-nine percent interest in the Colonial corporation. This condition or requirement carried over into most of the pertinent period.

There were other incidents which were supported by some evidence and submitted to the jury as part of plaintiff's case to show a violation of the Dealer Act.

As indicated above, Ford Motor urges that the instructions were incomplete and erroneous as to the proof required to prove a violation of the Act. We cannot describe or analyze all the instructions here. Considering the instructions as a whole, as we must, the trial judge properly instructed on "coercion," "intimidation," and "good faith." It instructed that "good faith" was to ". . . be determined in a context of actual or threatened coercion or intimidation." *See Hanley v. Chrysler Motors Corp.*, 433 F.2d 708 (10th Cir.). Also, if Ford ". . . through a series of acts, deprived [plaintiff dealer] of the right as an independent businessman to control its own business to serve [Ford Motor's] own economic interest and in disregard of [the

dealer's] interest, . . ." a violation of the Act could result. The court against this set out Ford Motor's right under the Act to "urge," "argue," "explain," "endorse," "recommend," and "persuade." The court also instructed that Ford Motor ". . . may reasonably be concerned with the management, facilities, finances and inventory of its dealers, . . . may require a dealer to adhere to reasonable standards in these areas of the dealer's operations." The instructions that Ford Motor could "require" the dealer to follow reasonable standards as to facilities and finances are clear, and correctly submitted this aspect to the jury. The court did not use the "wrongful demand"—"coercion" coupling Ford Motor urges, but this was not required to be separately treated in those words. Also we find no error in the use in the instructions of such terms as "arbitrarily," "unreasonably," or "oppressive."

We, of course, held in *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir.), that mere arbitrariness of an automobile manufacturer does not constitute a violation. The instructions before us do not constitute such a submission to the jury. *See also Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.).

We find no error in the instructions, and hold that the issues were properly submitted to the jury.

To consider only one of several elements presented to the jury, that is, the requirement that Mr. Pease be given a right to buy in the dealership, we must hold that there was sufficient evidence upon which the jury could base its verdict, having been properly instructed. It appears that Mr. Pease was placed on the scene by Ford Motor, and then inserted into the enterprise as a condition to the granting of a franchise. The Dealer Policy Board deferred action on the franchise application until Mr. Pease was given the buy-in agreement, and instructed the local representative of this. This was the period May to September 1969.

There was testimony that Ford Motor wanted Mr. Pease to have "full control."

Under the buy-in agreement, Mr. Pease apparently paid $20,000.00 down, and the balance of the large sum required to pay for the forty-nine percent interest was to come from profits from the dealership. It appears that the initial payment was withdrawn by him, although the record is not entirely clear. In any event, the jury could well infer that Mr. Pease was given a free ride in the acquisition of a forty-nine percent interest in a large dealership, all as a condition to granting the franchise. Mr. Pease was not in a position to provide additional capital for Colonial which Ford Motor found to be necessary. Thus the corporation could only look to the fifty-one percent interest owner for more capital contribution. The insertion of Mr. Pease thus created this fundamental corporate problem related to capital requirements. Mr. Pease and Mr. Belnap *both* had full managerial authority and responsibility under the franchise, both were told in mid-1974 of the need for additional capital. The buy-in agreement between Mr. Belnap and Mr. Pease provided that Mr. Pease would discharge his managerial duties in a manner acceptable to Ford Motor. There was testimony that the buy-in agreement was intended to provide Mr. Pease with control over the operation of the agency. Mr. Belnap in October 1974 negotiated Mr. Pease out of the agency, but at a time when the several problems had become so serious that the agency was failing.

Thus again, there was sufficient evidence that the requirements made by Ford Motor or conditions to granting the franchise had a direct consequence on the liquidity of the dealership. This in turn provided a basis for the damage award. Ford Motor urges that the damages were derived only from the cutoff of floor planning, but we find no support for this position. There was evidence of change in profits and volume which was adequate evidence.

The Automobile Dealer Franchise Act, 15 U.S.C. §§1221-1225, in section 1223 provides for a three-year limitation period. Three years before the date of filing the action would be May 15, 1972. *See* our opinion in *Hanley v. Chrylser Motors Corp.*, 433 F.2d 708 (10th Cir.), decided in 1970. The plaintiff argues that the limitation issue is controlled by *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77, decided in 1971. The *Zenith* case was an antitrust case under section 4 of the Clayton Act, with a four-year limitation period. Ford Motor argues that *Zenith* is not applicable to this type of case, and in any event, that any prelimitation incidents were brought with the *Zenith* exceptions by the plaintiff and refers particularly to the Belnap-Pease buy-in agreement. Ford Motor in its brief states:

> "Thus even assuming that Colonial ever had a claim for the alleged transfer of control from Belnap to Pease, the last alleged act of Ford was to force the signing of the Belnap-Pease agreement. The execution of that agreement was 'by its nature permanent at initiation without further acts.' "

The parties cite *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir.); *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768 (3d Cir.); and *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir.).

The control-liquidity problems were developed in the record. There was testimony as to several reasons why the problem arose in the dealership which are not mentioned in this opinion, but upon which the jury could well have based its verdict. There was evidence sufficient to establish, for the jury, a causal connection between the size or cost of the new location and facilities, and the problem; and similarly the testimony as to inventories, parts, flooring expense as related to inventory, and others. The liquidity problem existed, and was at its worst in the 1972-1974 period. As

indicated, Ford Motor complained about the problem to plaintiff several times during the first half of 1974.

We see no reason why the doctrine announced in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct 725, 28 L.Ed.2d 77, as to the period of limitations, should not be here applied. The acts of the manufacturer sought to be reached under the Automobile Dealer Franchise Act, 15 U.S.C. § 1221, are so comparable to the acts condemned in the antitrust treble damage statutes that the same considerations should be used in the application of the limitation provisions. It is apparent that the Court in *Zenith* was speaking only to the antitrust action when it expressed the basic accrual of a cause of action, and availability of proof connection upon which the decision was based. Thus the Court said:

> "In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted."

The proof of damage problem as to the liquidity-management claims obviously was the same as in *Zenith*.

The courts in cases following closely in time the *Zenith* decision have said as in *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768 (3d Cir.), an antitrust action:

> "... However, if the district court should find that some portion of Waterman's damages were too speculative to be ascertainable at the time the overt act which produced them occurred, then those damages which become ascertainable within the four years

> prior to the filing of the complaint will be recoverable."

Also in *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir.), which was a patent case with a claim by dealers that the patent could not be enforced because of patent misuse through antitrust violations, the court said:

> "For these reasons we hold that Louisville [a dealer] is entitled to recover threefold those damages for the period beginning on May 31, 1964 which could not be proved with reasonable certainty in late 1963 [the date of termination of the distributorship]."

A similar statement appears in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir.), an antitrust action, where the court said:

> "The authorities cited above establish that continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action."

The court continued and said in substance that a "newly accruing claim for damages" requires an act occurring within the period.

Thus we must hold that the pre-limitation period acts such as the relocation requirement and the Pease requirement, and others, were of such a nature that damages could not have been ascertained until an extended period of time had elapsed. The event which initiated the conditions, that is, the signing of the buy-in agreement or the agreement to the location change requirement, of course, took place at a fixed day and time of day, but the consequences in terms of ascertainable or probable damages under *Zenith* did not give rise to a cause of action until much later, and

within the three-year period. Thus the "action for damages" accrued within the limitation period expressed in the Dealer Act.

The judgment of the trial court is in all respects AFFIRMED.

McKAY, Circuit Judge, concurring in part, dissenting in part:

I concur in the opinion of the court on all issues except one. I disagree with its conclusion that there was sufficient factual evidence to support the jury's determination that Ford Motor Credit Company was not subject to the Automobile Dealer Franchise Act under the circumstances of this case. The Act covers automobile manufacturers, assemblers and any other entity "which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." 15 U.S.C. § 1221 (1976). First, in light of the broad remedial purposes of the Act, it is my view that the element of "control" is conclusively established by the showing that Ford Credit is a wholly owned subsidiary of Ford Motor. Second, with the facts presented in this case, Ford Credit's involvement is shown to be exclusively for the purpose of facilitating the distribution of automobiles manufactured by its parent manufacturer and assembler. I do not believe there was any evidence to support a contrary determination by the jury with or without proper instructions.

Opinion on Rehearing of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 76-2079, 76-2080 and 76-2083

COLONIAL FORD, INC, a Utah Corporation,
Plaintiff, Appellee, Cross-Appellant,

v.

FORD MOTOR COMPANY, a Delaware Corporation,
Defendant, Appellant,

and

FORD MOTOR CREDIT COMPANY, a Delaware Corporation,
Defendant, Appellant, Cross-Appellee

(Decided February 5, 1979)

Peter W. Billings, Stanford B. Owen and *Peter W. Billings, Jr.*, of *Fabian & Clendenin*, Salt Lake City, Utah, for defendant-appellant Ford Motor Co.

Harold G. Christensen and *R. Brent Stephens*, of *Snow, Christensen & Martineau*, Salt Lake City, Utah, and *George V. Burbach*, Dearborn, Mich., for defendant-appellant and cross-appellee, Ford Motor Credit Co.

Daniel L. Berman, Richard W. Giauque and *Gordon Strachan*, of *Berman & Giauque*, Salt Lake City, Utah, for plaintiff-appellee and cross-appellant Colonial Ford, Inc.

Before SETH, Chief Judge, and DOYLE and McKAY, Circuit Judges.

McKAY, Circuit Judge.

We have granted Ford Motor Company's petition for rehearing because we may have understated a significant element of the case. While we believe some clarification of

our prior opinion[1] is in order, except as clarified herein our prior opinion with respect to the dispute between Ford Motor Company and Colonial is reaffirmed.

We also have granted Colonial Ford, Inc.'s petition for rehearing. We conclude that a new trial should be granted with reference to the issue of whether Ford Motor Credit Company is liable to Colonial for acts allegedly done in violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976).

FORD MOTOR COMPANY PETITION FOR REHEARING

In our original opinion, reported at 577 F.2d 106, we pointed out that Ford Motor insisted that Marshall Pease be given the right to acquire a forty-nine percent interest in the automobile dealership. The record also shows that Ford demanded as a condition to the franchise that Pease be given absolute control of the enterprise. This position was asserted in meetings between Robert Parr of Ford and LeGrande Belnap of the dealership. Ford's Dealer Policy Board took the status of the franchise under advisement pending a resolution of these ownership and control issues. Belnap, who had by this time acquired a large investment in the enterprise, was under significant pressure to have the franchise issue resolved. The Board nonetheless deferred action on the franchise until all conditions and demands were complied with, including the requirement that "Marshall Pease [be] given a buy-in by Belnap." It appears that on July 9th, Parr advised Belnap that Ford Motor required for reinstatement of the franchise that Pease be given control of the dealership and a forty-nine percent buy-in that was to be paid from profits. Although Belnap strongly opposed the buy-in requirement, to protect his

1. *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106 (10th cir. 1978).

investment, he ultimately had to agree. The record shows that Pease paid $20,000.00 down on the buy-in contract and thereafter withdrew this amount from the dealership. Ford Motor's absolute requirement meant that Pease received a free ride to a forty-nine percent interest in a large dealership—which interest, of course, reduced Belnap's ownership share. Ford Motor would have us attach no consequence to Belnap's loss. In its petition for rehearing, Ford states: "There is no reason why the reduction of Belnap's stock ownership from 100% to 51% prevented him from providing additional working capital." We are not persuaded.

The dealership control arrangement was not a "management" aspect of the dealership in which Ford would have a legitimate interest, but instead was a requirement for the transfer of "ownership" to a particularly favored person. It is obvious that the position would be more attractive to a manager with ownership, but the matters are nevertheless separate. The record does not indicate the exact reason why Pease was to be placed in such a position, but it is clear that it was entirely the idea of Ford Motor and was resisted by Belnap until it became impossible to continue opposition.

Ford Motor takes the position that these events happened before a new franchise was issued. It is true these events occurred during the dealership's operation in the hiatus between Ford's notice of franchise termination to Petty Ford, Inc.—the dealership Belnap had acquired—and Belnap's formally executing his franchise agreement with Ford. Ford contends that this chronological circumstance makes the Pease buy-in a matter of "contract," and that, as a result, Ford could use the franchise to enforce everything which had gone on before. Ford apparently would consider irrelevant the pressures and coercion applied prior to

formal execution of the "new" franchise: all became regularized by the franchise; all became purified as "contractual."

We cannot agree that the timing of franchises can be so manipulated to regularize improper and coercive demands and to avoid the consequences of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). These pre-franchise events described above necessarily became involved in the franchise, and the Act was violated by Ford's demands for what it blandly described as "contractual performance." The bad faith of Ford Motor Company thus carried over into the franchise and permeated the entire relationship.

COLONIAL FORD'S PETITION FOR REHEARING

Ford Motor Credit is a wholly owned subsidiary of Ford Motor Company. Its primary business is financing the distribution of Ford automobiles by providing Ford dealers with capital. Approximately 90 percent of its multibillion dollar financing was in this enterprise; the remaining 10 percent was invested in nonautomotive loans. It is the conduct of Ford Motor Credit in providing financing to Colonial which forms the basis of the complaint against the financing subsidiary in this case. The particular issue before us on rehearing is whether Ford Motor Credit is subject to the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). The Act authorizes federal court actions by automobile dealers for bad faith acts by automobile manufacturers. An "automobile manufacturer" is defined to include "any person, partnership, or corporation which acts for and is under the control of such manufacturer . . . in connection with the distribution of . . .

automotive vehicles." 15 U.S.C. § 1221(a). We must determine whether Ford Motor Credit comes within the scope of this inclusive definition.

The trial court submitted the question of the Act's applicability to the jury with an instruction which in effect made "control" depend on specific overt acts in the actual transactions with Colonial. Colonial argues that a wholly owned subsidiary which acts for a manufacturer in connection with distribution of automobiles is subject to the Act as a matter of law and that the jury should have been so instructed. We agree.[2] In light of the broad remedial purposes of the Act, the element of "control" is conclusively established by a showing that Ford Motor Credit was a wholly owned subsidiary of Ford Motor and that its involvement with Colonial was exclusively for the purpose of facilitating the distribution of automobiles manufactured by its parent.[3]

The Act is designed to curtail the kinds of coercion and intimidation of retail dealers by manufacturers made possible by the parties' relative economic inequality. *Woodard v. General Motors Corp.*, 298 F.2d 121, 127 (5th Cir.), *cert. denied*, 369 U.S. 887, 82 S.Ct. 1161, 8 L.Ed.2d 288 (1962);

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2. The only question for the jury under the Act was whether Ford Motor Credit conducted itself in good faith in its relationship with Colonial. While the good faith issue was submitted to the jury in the trial below, it was submitted by means of a special interrogatory which permitted the jury to reach a conclusion based either on whether good faith actually existed or on whether the Act applied at all. The interrogatory read:

> State whether the defendant Ford Motor Credit Company failed to act in good faith in its business relations with Colonial Ford, in violation of the Dealer Day in Court Act.

Brief of Ford Motor Credit Co., at 3.

3. A jury question may be presented if the requisite element of control is alleged on a basis other than corporate parental ownership. For example, a bank that is not a part of the manufacturer's corporate empire may be alleged to be under the manufacturer's control for purposes of the Act. The question would be one for the trier of fact. *See, e.g., Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 441-42 (1st Cir.), *cert. denied*, 385 U.S. 919, 87 S.Ct. 230, 17 L.Ed.2d 143 (1966).

DeCantis v. Mid-Atlantic Toyota Distributors, Inc., 371 F.Supp. 1238, 1241 (E.D.Va. 1974). The most obvious point of leverage in the manufacturer-dealer relationship is financing. When, as in this case, a manufacturer uses a wholly owned subsidiary to facilitate that financing, it brings the subsidiary within the remedial purposes of the Act whether or not it is shown that the manufacturer ordered the specific conduct complained of. It would be unrealistic to suppose that a wholly owned subsidiary working to facilitate the parent's distributive activities would act other than to promote the desires of its parent. Thus the Act's "control" requirement is satisfied by showing corporate ownership and confluence of interest.

We find support for our position in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). In that case, a Chrysler sales subsidiary was held to be a manufacturer under the Act even though its only activity was to distribute automobiles manufactured by its parent. This result was reached despite the fact that each corporation was legally independent and operated in its own sphere. *Id.* at 791. The court analyzed the issue as follows:

> The $107,000 judgment was entered against Chrysler Corporation and Chrysler Motors Corporation. Chrysler Corporation manufactures the automobiles but sells them only to Chrysler Motors Corporation, its wholly-owned sales subsidiary. Chrysler Motors has sole responsibility for distribution and marketing of Chrysler products, and it is this corporation alone which enters into franchise contracts with automobile dealerships.
>
> Clearly both Chrysler Corporation and Chrysler Motors are automobile manufacturers as defined in the Act. Chrysler Motors is such because it is a "corporation which acts for and is under the control of such manufacturer or assembler [Chrysler Corporation] in connection with the distribution of said automotive vehicles." 15 U.S.C.§ 1221(a). Either

> could be sued for failure "to act in good faith in performing or complying with any of the terms or provisions of the franchise." 15 U.S.C. § 1222.[4]

447 F .2d at 791. The *Chrysler* case did not employ a specific transactional analysis of the Act's application. Instead, it focused on the general functional relationship between the parent and the subsidiary. We take the same approach here. We hold that the Act's provisions did apply to Ford Motor Credit. We therefore order a new trial on the question of Ford Motor Credit's liability to Colonial under the provisions of the Act.

In addition, we expressly reaffirm our earlier conclusion that the acceptance of certain real estate installment payments by Ford Credit did not give rise to a waiver of its claims. We conclude, however, that the injunction ordered to remain in effect pending appeal—which injunction we previously indicated would be set aside—should be preserved until, upon remand, the district court is able to determine what remedial relief might be appropriate in light of today's decision. Subject to the opinion of this court as modified on rehearing, the fashioning of appropriate remedies is a matter that should be left to the court below.

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4. The court went on to suggest that a further requirement for suit was that the defendant manufacturer have a contractual relationship or agreement with the dealer. 447 F.2d at 791. In the instant case, it is unquestioned that Ford Motor Credit had entered into a contractual relationship with Colonial.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
JANUARY TERM — FEBRUARY 5, 1979

Nos. 76-2079, 76-2080, 76-2083
(D.C. No. C-75-190)

COLONIAL FORD, INC., a Utah Corporation,
Plaintiff-Appellee, Cross-Appellant,

vs.

FORD MOTOR COMPANY, a Delaware Corporation,
Defendant-Appellant,

and

FORD MOTOR CREDIT COMPANY,
a Delaware Corporation,
Defendant-Appellant, Cross-Appellee.

Before Honorable OLIVER SETH, Chief Judge, Honorable WILLIAM E. DOYLE and Honorable MONROE G. MCKAY, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah and was submitted on the briefs at the direction of the Court.

Upon consideration whereof, it is ordered that the judgment of that Court is affirmed in part and reversed in part. The cause is remanded to the United States District Court for the District of Utah for a new trial with reference to the issue of whether Ford Motor Credit Company is liable to Colonial Ford, Inc., for acts allegedly done in violation of

the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). Further proceedings shall be conducted consistent with the original opinion of this Court filed May 31, 1978, as clarified by the opinion on rehearing filed this date.

It is the further judgment and order of this Court that the injunction to prevent Ford Credit from foreclosing on its deed of trust, and also from executing on its judgment of $2,897,125.22 for balance due from Colonial entered on its counterclaim, which the trial court ordered to remain in effect pending appeal, should continue, upon remand, until the District Court is able to determine what remedial relief might be appropriate in light of the opinions of this Court rendered May 31, 1978, and February 5, 1979.

/s/HOWARD K. PHILLIPS

Howard K. Phillips, *Clerk*

Order of the Court of Appeals upon Petitions for Rehearing and Suggestions for Rehearing In Banc

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
JANUARY TERM—FEBRUARY 5, 1979

Nos. 76-2079, 76-2080, 76-2083

COLONIAL FORD INC., a Utah Corporation,
Plaintiff-Appellee, Cross-Appellant,

vs.

FORD MOTOR COMPANY, a Delaware Corporation,
Defendant-Appellant,

and

FORD MOTOR CREDIT COMPANY,
a Delaware Corporation,
Defendant-Appellant, Cross-Appellee.

Before Honorable OLIVER SETH, Chief Judge, Honorable WILLIAM J. HOLLOWAY, JR., Honorable ROBERT H. MCWILLIAMS, Honorable JAMES E. BARRETT, Honorable WILLIAM E. DOYLE, Honorable MONROE G. MCKAY, and Honorable JAMES K. LOGAN, Circuit Judges.

This matter comes on for consideration of the petitions of Ford Motor Company and Colonial Ford, Inc., for rehearing and suggestions for rehearing en banc filed June 14 and June 15, 1978, respectively.

The petition for rehearing of both parties was resolved by Judges Seth, Doyle and McKay, who heard the appeals. On September 27, 1978, they granted rehearing without oral argument and on the existing briefs.

Through inadvertence and clerical oversight, the order on the granting of the petitions for rehearing was not formally entered.

Thereafter no judge in regular active service or a judge who was a member of the panel that rendered the decision requested a vote on the suggestions for rehearing en banc by the parties.

Upon consideration whereof, and in order to correct the clerical oversight, the Court orders, as follows:

1. Ford Motor Company's petition for rehearing is granted as of September 27, 1978, on the existing briefs.

2. Colonial Ford, Inc.'s petition for rehearing is granted as of September 27, 1978, on the existing briefs.

3. The suggestions for rehearing en banc by Ford Motor Company and Colonial Ford, Inc., there being no request by any qualified judge of the Court for a vote on such suggestions, are hereby denied.

4. The judgment entered on May 31, 1978, is vacated. The opinion of Judge Monroe G. McKay on rehearing is ordered filed this date.

5. The opinion of the Court filed May 31, 1978, with respect to the dispute between Ford Motor Company and Colonial Ford, Inc., is, as clarified in the opinion on rehearing on appeal filed February 5, 1979, reaffirmed.

6. Judgment is entered in accordance with the opinion filed in the captioned cause on May 31, 1978, as clarified by the opinion on rehearing filed February 5, 1979.

/s/HOWARD K. PHILLIPS

Howard K. Phillips, *Clerk*

Supreme Court, U. S.
FILED
AUG 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1818

FORD MOTOR COMPANY
Petitioner,

v.

COLONIAL FORD, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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August 1979

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1818

FORD MOTOR COMPANY

Petitioner,

v.

COLONIAL FORD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

Colonial Ford, Inc. ("Colonial") files this brief in opposition to the petition for certiorari of Ford Motor Company ("Ford") seeking to overturn a jury verdict on the ground the evidence was insufficient to support the jury's determination that Ford had violated the Automobile Dealers Day In Court Act ("ADDICA"). The Tenth Circuit rejected Ford's claim of evidentiary insufficiency and found Ford's coercive conduct had

"permeated the entire relationship" between Ford and Colonial.

QUESTIONS PRESENTED

1. Whether Ford's deprivation of Colonial's right to run its own business and to control critical aspects of its business including its management, facilities, and financing through a continual course of conduct in the context of the termination and threat of termination of Colonial's Ford franchise constituted a sufficient evidentiary foundation for the jury's determination that Ford had violated ADDICA, 15 U.S.C. §1222.

2. Whether Ford can change its story from the trial when it categorically denied having anything to do with changes in Colonial's management and ownership and now claim for the purpose of seeking review in this Court it was justified in requiring such changes.

3. Whether evidence Ford forced Colonial to relocate and build a new uneconomic facility, the location, size and consequent cost of which Ford determined, in disregard of Colonial's financial capability and legitimate financial interest can constitute a component element of a continuing course of coercive conduct by Ford in violation of ADDICA, 15 U.S.C. § 1222.

STATEMENT OF THE CASE

1. *The questions Ford claims are presented are not presented by the evidence.* Ford fundamentally misstates the evidence contained in over 2,500 pages of trial testimony and 200 trial exhibits that supports the

jury's verdict that Ford violated ADDICA. Ford not only has failed to fairly summarize that evidence, but attempts to present questions for review by this Court that are in conflict with and not supported by that evidence.

Ford claims one of the two questions presented for review is whether ADDICA prohibits Ford from requiring qualified and experienced management as a condition to granting a Ford franchise. (Ford Pet. for Cert. at 2.) At trial, however, Ford falsely but categorically denied doing anything with regard to changing Colonial's management or ownership so as to now preclude Ford from claiming its conduct with regard to Colonial's management and ownership was justified.

Colonial's evidence was that Ford through Ford's District Manager, Mr. Parr, under the threat of refusing to reinstate Colonial's Ford franchise, required Colonial to give up control of Colonial's dealership to a Mr. Pease and required Colonial's president and sole stockholder, LeGrande Belnap, to sell Mr. Pease a 49% interest in Colonial without Mr. Pease having to pay anything. (179-89, 393-97, 399-400, 402-04; PX-4, PX-49.)[1] Colonial's evidence was that Mr. Parr demanded Colonial relinquish "sole and absolute control" of the dealership to Mr. Pease under the threat of refusing to reinstate Colonial's Ford franchise. (182.) Mr. Parr dictated the terms of the contract granting

[1] Page citations are to the Joint Appendix filed in the United States Court of Appeals for the Tenth Circuit. Citations to exhibits are to the exhibit numbers used in the United States District Court, reprinted in volumes 7, 8 & 9 of the Joint Appendix; plaintiff's exhibits are marked PX- ; Ford Motor's exhibits are marked DX- ; and Ford Credit's exhibits are marked DCX- .

Mr. Pease control and selling him an interest in the dealership (180-85, 393-96, 399-400, 402.), and that contract was signed on the date the contract bears, July 29, 1969 (PX-4.), in Mr. Parr's office at Mr. Parr's insistence. (402-03, 179-89.) Colonial's evidence was offered through the testimony of Mr. Belnap and Mr. Summerhays, a lawyer who represented Mr. Belnap in these transactions (178-89, 393-96, 399-400, 402-04; PX-4.), and was corroborated by Mr. Summerhays' business calendar which under the date of July 29, 1969, the date of the Pease-Belnap contract, contained the notation "Colonial Ford review of Pease-Belnap contract—at Parr's office 3 hours." (PX-49.)

Ford at trial did not attempt to justify placing Mr. Pease in charge of the dealership or requiring Mr. Belnap to grant Mr. Pease a buy-in in the dealership. Ford categorically denied having anything to do with requiring Colonial to relinquish control of the dealership to Mr. Pease or requiring Mr. Pease be given a 49% buy-in in Colonial. Mr. Parr was the only witness who testified for Ford with regard to the Pease-Belnap transactions. Mr. Parr denied having anything to do with the Pease-Belnap transaction. (320-34.) He denied suggesting to Mr. Belnap that Mr. Pease be given a buy-in in Colonial. (329-31.) He categorically denied that he did anything to deprive Colonial of the control of its management or dealership. (329-34.) He went further. Mr. Parr testified:

> Q: Did you recommend to Mr. Belnap that Mr. Pease be given the charge of operating the franchise?

A: No.

Q: I am using the word "recommend."

A: I understood.

Q: Suggest?

A: No.

Q: Advise?

A: No.

Q: Hint?

A: No.

Q: Indicate?

A: No. (330-31.)

Mr. Parr denied Mr. Belnap and Mr. Summerhays met with him at his office on July 29 (333-34.), and even denied under oath he had ever seen the Pease-Belnap contract prior to the filing of Colonial's complaint. (332-37.)

The dispute between Colonial's evidence and Mr. Parr's testimony presented a question of fact for the jury to resolve and the jury resolved it against Ford, but Ford's evidence did more than that. Ford cannot have it both ways. It cannot totally deny doing something at trial, and then claim on appeal that it did it, but what it did was justified. A manufacturer cannot falsely deny engaging in conduct and then when that doesn't work claim while it engaged in that conduct what it did was necessary to protect its legitimate business interest. The question, therefore, that Ford claims

is presented with regard to Colonial's management is precluded by Ford's own testimony at trial.

The other question Ford claims is presented is whether ADDICA prohibits Ford from requiring a dealer to keep its commitment to provide adequate dealership facilities. (Ford Pet. for Cert. at 2.) But that question is not presented by the evidence. The jury, indeed, was specifically instructed that Ford may under ADDICA "require" its dealer to provide adequate facilities. (993-95.) The evidence was not that Ford required Colonial to provide adequate facilities, but uneconomic facilities. The evidence was Ford forced Colonial to relocate and build an uneconomic facility, the location, size and consequent cost of which Ford determined regardless of Colonial's financial interest. (214-16, 221-22, 224-25, 429, 432-35, 541, 616-17, 1647; PX-10, PX-44, PX-87.) Ford forced Colonial to buy a site for a new dealership facility that cost Colonial $70-80,000.00 an acre. (201-07.) Ford rejected a site Colonial proposed that would have cost Colonial $18-20,000.00 per acre, and was subsequently acquired by the leading Chevrolet dealer in Metropolitan Salt Lake. (201-02.) Ford even rejected a site within 200 feet of the site it made Colonial acquire that Colonial could have acquired at a price of $20,000.00 per acre. (203-04.) Once Ford had forced Mr. Belnap to acquire a new location for Colonial (214-16; PX-10.), Ford and not Colonial determined the size and consequent cost of Colonial's new facility. (224-25.) Mr. Belnap was not even consulted. (224-25, 429; PX-44, PX-87.) Under Ford's normal procedures Ford conducts a feasibility study with regard to any

new dealership facility to determine whether the new project is a good thing for the dealership. (432.) Contrary to its own procedures Ford did not conduct any feasibility study to determine whether Colonial could profitably operate its dealership from the million dollar facility that Ford required Colonial to relocate and construct. (432-35, 531, 616-17; PX-13, PX-14, PX-15.) Ford failed to conduct a feasibility study under its normal procedures even though two of the five Ford dealers in Metropolitan Salt Lake had recently constructed new facilities and had experienced substantial economic difficulty after moving into those facilities.[2] (430-31.) The adverse impact of Colonial's new facility on Colonial's liquidity and profitability was admitted by Ford. (PX-50.), and is dramatically portrayed in the increased cost of the new facility in terms of Colonial's new car sales. In 1973 before Colonial moved into its new facility, its facilities cost per new unit sold was $42 per unit. (PX-75.) In 1974 its facility cost per new vehicle sold, even with an increase in sales, was $118 per unit or an increase of over 150%. (PX-75.)

Ford at the trial did not attempt to defend Ford's requirements for Colonial's new facilities as necessary or adequate for Colonial's dealership. On the contrary the Ford employee, Mr. Goedde, who in fact approved Colonial's plans for its new facility and thereby its consequent size and cost (429; PX-44, PX-53, PX-84.) simply denied doing that. Mr. Goedde denied Ford

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[2] The question of whether the new facility was economically feasible for Colonial was never even discussed with Mr. Belnap. (221-22.)

required Colonial to construct facilities that were substantially in accordance with Ford's requirements. (665.) He even denied that Ford approved the plans for Colonial's new facility. (667-68.) He insisted on his denial even though he wrote a letter saying Ford was required to approve Colonial's facility plans. (PX-87.) When Mr. Goedde's letter was called to his attention on cross-examination he testified:

> Q: So that we just ought to erase that language from the letter. You didn't mean what you said?
>
> A: In terms of that particular line, that is correct. (670-71.)

The evidence thus, presented a question of fact for the jury as to whether Ford had required Colonial to build a new uneconomic facility, the size and consequent cost of which Ford determined without regard to Colonial's financial interest. But the evidence did more than present a jury question. How can Ford now claim the question presented for this Court is whether ADDICA prohibits an automobile manufacturer from requiring that a dealer provide adequate dealership facilities when at trial Ford denied imposing any requirements with regard to Colonial's new facilities.

Ford again cannot deny doing it at trial and then on appeal claim the question presented was whether what it did was necessary to protect its legitimate interest as an automobile manufacturer.

2. *The evidence, as the Tenth Circuit twice concluded, was not only sufficient but overwhelming that Ford violated ADDICA.* Colonial's practical predecessor in interest, and indeed, the assignor of Colonial's original Ford franchise was Petty Ford, Inc. (197, 341-42; PX-5, PX-42.) Petty Ford, Inc. was originally owned by the Petty family and under the control of a Neuman Petty. (144.) Mr. Petty's personal problems in 1965 resulted in the Petty family bringing in a son-in-law, Mr. Belnap, to serve as the nominal dealer for the dealership. (145.) Mr. Petty's problems persisted and over the next three to four years Mr. Belnap's responsibility in the dealership increased, and contrary to Ford's claim (Ford's Pet. for Cert. at 6-7.) by the end of 1968 Mr. Belnap had assumed full managerial control and had acquired a 51% interest in the dealership. (146; DX-84.) Although Mr. Belnap had managerial control there were disputes between the Petty family and Mr. Belnap over their ownership interest, and this internal dispute concerned Ford. (PX-1.) Ford told Mr. Belnap if the dispute in ownership was not resolved, Ford would terminate Petty Ford's franchise. (159.) These disputes were not resolved. Ford issued a notice to terminate Petty Ford, Inc.'s franchise on May 15, 1969. (161; PX-2.)

A. *Ford's Plan to Coerce Colonial.* Upon receipt of Ford's notice of termination Mr. Belnap filed an appeal with Ford's Dealer Policy Board to rescind the termination, and a hearing was set with that Board for July 1, 1969. (161-62.) Before the hearing Mr. Belnap met with Mr. Parr to discuss what

Ford wanted to rescind the franchise termination. (164-65.) Mr. Parr told Mr. Belnap Ford wanted to have the notice of termination rescinded and the dealership continued provided Ford's conditions were met. (165-66, 170, 387-88.)

During May and June of 1969 Mr. Parr met with Mr. Belnap and his attorney, Mr. Summerhays, and told them what Ford required to rescind the termination. (170, 172-73, 387-90.) Contrary to Ford's claim Mr. Parr and Mr. Belnap did not mutually devise a plan for continued Ford representation. (Ford's Pet. for Cert. at 8.) Mr. Parr, with the sanction of termination hanging over the franchise, told Mr. Belnap Ford would require five conditions for reinstatement. (165-69, 170, 387-90.) Mr. Parr insisted that Petty Ford, Inc., be reorganized so that only one corporation had an interest in the dealership and Mr. Belnap acquire ownership of that corporation from the Petty family. (167, DX-24.) Ford demanded that the dealership be recapitalized through the infusion of a substantial amount of new capital. (165; DX-24.) The conditions of reorganization and recapitalization were to be met before Mr. Belnap's hearing with the Dealer Policy Board. *Id.* Ford also demanded the dealership relinquish its heavy duty truck franchise (167-68.), the dealership relocate (386-87; DX-24.), and finally Mr. Pease be given a buy-in in the dealership. (166-67, 388, DX-24.) Mr. Parr mentioned, in the May and June meetings, giving Mr. Pease full control of the dealership, but when Belnap vigorously objected, the issue was dropped. (168-69.) Mr. Parr told Mr. Belnap if the five conditions were satisfied there would be no question about the

reinstatement of the franchise (166, 390.), and Mr. Parr also demanded the dealership's name be changed to Colonial Ford, Inc. (DX-24.)

Prior to July 1, Mr. Belnap resolved his disputes with the Pettys, acquired their interest, and invested new capital in the dealership. Mr. Belnap's total investment in the dealership after these transactions was $460,000.00. (170-72, 572, PX-3, 90.) Ford's statement that Mr. Belnap purchased only 51% of the dealership is false. He purchased the entire interest in the dealership. (170-72, 572; DX-84, PX-90.) Mr. Belnap's substantial investment in the dealership without reinstatement of the franchise was a substantial risk, but he did so in order to comply with Ford's demands. (166, 177.)

On July 1, Mr. Belnap and Mr. Summerhays met with Ford's Dealer Policy Board and told the Board that Ford's two conditions of reorganization and recapitalization had been accomplished. (174.) He also told the Board he would relocate the dealership eventually *if he could do so economically* (174, 389, 391-92.); he would temporarily relinquish the heavy duty truck franchise (391.); and he would consider giving Mr. Pease or another general manager a buy-in. (174, 389, 391-92.) Nothing was said about giving Mr. Pease control of the dealership. The Dealer Policy Board told Mr. Belnap they would take the matter under advisement. (178.) In fact, the Dealer Policy Board decided to defer any action until Mr. Belnap had complied with all of Ford's conditions. (PX-39, PX-42.)

B. *Ford coerced Colonial to relinquish control of its dealership to Mr. Pease.* Mr. Parr proceeded to implement Ford's plan. Between July 1 and July 29, Ford required Mr. Belnap to give up control of the dealership to Mr. Pease and give Mr. Pease a buy-in in the dealership. (179-89, 393-99, 402-04.) Mr. Parr met with Mr. Belnap after Mr. Belnap's return from Dearborn on July 9. (179.) Mr. Parr told Mr. Belnap Ford insisted Mr. Pease be given "a 49% buy-in and control of the dealership or there would be no reinstatement of the franchise." (180.) Mr. Belnap was stunned. *Id.* He called Mr. Summerhays and asked him to join the meeting. (181.) Mr. Summerhays came and Mr. Parr repeated his demands. (181-83, 393-95, 397-98.) Mr. Summerhays told Mr. Parr that faced with Ford's ultimatum Mr. Belnap didn't need a lawyer, but a secretary. (183, 394-95.) But Mr. Parr persisted and dictated the terms of a contract between Mr. Belnap and Mr. Pease. (184-85.) On July 29, Mr. Belnap yielded to Ford's ultimatum and executed a written agreement giving Mr. Pease control of the dealership and a 49% buy-in. (184-85, 402-03; PX-4.) The agreement provided "Marshall Pease shall be in charge of operating the franchise dealership. . . ." (PX-4.) Contrary to Ford (Ford Pet. for Cert. at n. 7.), this contractual provision which Mr. Parr dictated was intended to give Mr. Pease full control of the dealership and eliminate Mr. Belnap's authority. (182, 184-85, 187-88, 397-99, 402.)

Mr. Pease under the Pease-Belnap contract, which Ford and not Mr. Pease negotiated (401-02.), purchased a 49% interest in the dealership that Mr. Bel-

nap had paid over $460,000.00 for, for nothing. (171-72, 723-24; PX-4, PX-90.) Mr. Pease agreed to pay $20,000.00 for his interest in the dealership with the remainder of the purchase price to be paid out of the dealership profits. (PX-4.) Mr. Pease in fact immediately withdrew the $20,000.00. (193-94.)

Mr. Belnap only signed the agreement to avoid bankruptcy because Mr. Parr had told him "if he didn't give Mr. Pease absolute control of this dealership, there would be no reinstatement of the franchise." (185-86.) After Mr. Belnap capitulated and signed the Pease-Belnap contract Mr. Pease and not Mr. Belnap controlled Colonial Ford (194-96.), and Ford dealt exclusively with Mr. Pease (222-23, 231, 233-34.), except for the acquisition of a new location. (200-01.) Ford turned to Mr. Belnap on the issue of relocation "because Mr. Pease didn't have any money", and Ford required Mr. Belnap to furnish the necessary capital. *Id.*

C. *Colonial was not a prospective dealer and Ford's coercive conditions for the reinstatement of Colonial's franchise were not pre-franchise conditions.* Contrary to Ford's repeated claims, Colonial was not a prospective dealer and Ford's coercive conditions for the reinstatement of Colonial's franchise were not pre-franchise conditions. (Ford's Pet. for Cert. at 2-3, 8-9.) After Mr. Belnap capitulated to Ford's demands to relinquish control of the dealership, the Petty Ford franchise was assigned to Colonial on a standard Ford form. (341; PX-5.) Ford required the assignment and approved it (197, 341-42; PX-5, PX-42.), and Ford

reinstated Colonial's franchise. (338-39, 341; PX-5 PX-42.) Ford's own documents and Mr. Parr himself confirmed that the Petty Ford franchise had been assigned to Colonial and reinstated. (338-42; PX-5, PX-42.) Colonial was not only technically the successor to the Petty Ford franchise, it was also practically the successor. Ford required that Petty Ford be reorganized as a condition for reinstatement, it suggested the name Colonial (DX-24.), and the Ford conditions for reinstatement were intended to be imposed and were imposed upon Colonial.

After Colonial's franchise was reinstated (338-39, 341; PX-5.), Ford issued Colonial a new franchise because Ford wanted Colonial to have a franchise for a limited term. (338-39; PX-42.) The Petty Ford franchise that had been assigned and reinstated in August of 1969, was Ford's standard "continual franchise." (197, 338-39, 341-42; PX-5, PX-42.) Since Colonial, however, had not complied with Ford's condition of relocation, Ford in September of 1969 issued Colonial another franchise that was limited to a two-year term so as to guarantee Colonial's relocation. (199-201, 339; PX-5, PX-6, PX-42.)

D. *Ford forced Colonial to relocate and transfer all of its financing to Ford Credit.* By September 1969 Colonial, except for relocation, had complied with all of Ford's conditions for reinstatement including the relinquishment of its heavy duty truck franchise. (189-92, 338-39; DX-27, DX-47.) Colonial never entered into any contractual agreement with Ford to relocate and only committed to relocate because Ford gave it

no choice. (199-201, 338-39; PX-6.) Colonial did not relocate during the two-year term of its franchise because Ford would not approve the sites Colonial proposed. (201-07; PX-7.) When Colonial had not relocated by September 1, 1971, Ford issued Colonial a new franchise for a one-year term and told Colonial, that was it, it would relocate by the end of that year or lose its franchise. (206-07; PX-8.)

In late 1971 Ford attempted to get Colonial to purchase its present site at a cost of $70-80,000.00 per acre. (205-09.) Mr. Belnap was reluctant to acquire this site because he believed it was too expensive. (207-09; PX-7.) In the spring of 1972 Ford's regional manager, Mr. Yando, came to Salt Lake to inspect the proposed site. (207-08.) Mr. Belnap again expressed his concern about the site's cost. (207-09.) Mr. Yando responded by telling Mr. Parr to "get Mr. Belnap with Ford Credit . . ." (207.), Ford's wholly-owned financing subsidiary. Mr. Belnap was reluctant to finance with Ford Credit because he had "heard stories about being locked in completely with Ford Credit." (210.)

Mr. Belnap's fears were justified. When Ford Credit contacted Mr. Belnap, Ford Credit told Mr. Belnap that it would only consider providing a capital loan for Colonial to build a new facility and keep its franchise if Colonial terminated its existing financing relationships with local banks and placed all of its wholesale flooring and retail contracts with Ford Credit. (210; PX-20.) Belnap again objected and took the issue back to Mr. Parr. Mr. Parr in one of his more quot-

able epigrams said "[W]ell if you have to do it, give it to them. It's all in the Ford family." (212.)

Mr. Belnap continued to resist and on June 2, Mr. Parr personally came to Colonial's office and delivered a notice of termination of Colonial's one-year term franchise and issued Colonial a three-month franchise expiring September 15, 1972. (PX-10.) Mr. Parr made the message clear; he told Mr. Belnap that if Colonial didn't have a new location and building commitments by September, Ford would terminate the franchise. (214.)[3] At this point Mr. Belnap's investment in Colonial was over $600,000.00 and he had no choice. (215-16.) Mr. Belnap capitulated and committed to Ford Credit on June 16, 1972. (215-16; PX-11, PX-12, PX-13, PX-14, PX-15.) Colonial was required to place its wholesale flooring with Ford Credit, and under the express terms of its capital loan agreement was required to place all of its retail contracts with Ford Credit. (PX-12, PX-20 at ¶4.9.) The agreements between Colonial, Ford and Ford Credit further gave Ford the unconditional right to occupy the new facilities, "if, for any reason, Colonial Ford, Inc. should cease to be a Ford dealer at the proposed location." (228-29, 433-34; PX-19.)

Colonial paid a heavy price in independence to stay in business. Ford deprived Colonial of the management and control of its business, required Colonial to relocate and build costly new facilities when far less expensive alternatives were available, and required Col-

[3] Ford in its petition does not even mention the three-month franchise or Mr. Parr's ultimatum.

onial to sever its historic banking and financing relationships and finance its capital, wholesale, and retail financing requirements with Ford Credit

E. *Ford's coercion caused Colonial's liquidity and working capital problems.* Ford, after Colonial relocated, continued to build Colonial as a volume dealership in disregard of Colonial's financial interest. Ford in the first few months after Colonial moved to its new facility increased Colonial's planning volume by 30%. (434; PX-22.) Planning volume is a key planning figure for Ford. (435.) Planning volume represents the number of new vehicles Ford estimates a dealer should sell, and Ford's requirements for a dealer's inventory and working capital are based on the dealer's assigned planning volume. (232, 435, 438-40, 1648-49.) When Ford increased Colonial's planning volume, Ford anticipated under its own internal analysis that Colonial's inventory and working capital requirements would increase. (437-38.) Ford, however, did not inform Mr. Belnap that the dealership's planning volume had increased or that the increase would require additional working capital. (212-13, 231-32, 235, 436, 441-42.) Under Colonial's planning volume, Ford increased Colonial's new car inventories so that in the first seven months of 1974 Colonial's average new units in inventory increased by 100 per month. (440-41, 505-06.) The build up in Colonial's new car inventories was financed by Ford Credit allowing Colonial to run over the limits of its authorized flooring line in an amount of up to $1 Million (233, 497-98; PX-72.), and was, of course, directly a function of inadequate management control.

Prior to Colonial's move to its new facility, Colonial had not experienced any liquidity or working capital problems. (365-67, 441-42, 497; PX-3.) This situation changed after Colonial moved. Ford itself analyzed the cause of Colonial's liquidity problem. (443; PX-50.) Ford, in August of 1974, found the cause of Colonial's liquidity problem was directly attributable to the critical areas of Colonial's business in which Ford had deprived Colonial of the right to run its own business—that is, its management, facilities, and financing. (PX-58.) Ford found that the cause of Colonial's liquidity problem was in two basic categories of expense, new facility expense and wholesale flooring expense. (PX-50.) Colonial's cost in the first seven months of 1974 for these two categories of expense increased over the same period in 1973 by $140,000.00. (433; PX-50.)

Colonial met its liquidity problem by floating against Ford Credit. (PX-62, PX-63, PX-64.) Floating occurs when a dealer sells a new car and rather than paying off its wholesale financing obligation uses the cash in its business until the lender conducts a wholesale audit and demands payment. Ford Credit was well aware Colonial was floating and using the float to operate its dealership. (499-501, 881-82; PX-62, PX-63, PX-64.) Ford Credit allowed Colonial to float to finance its dealership by conducting infrequent wholesale audits. (879-80.) Thus, even though Ford Credit was fully aware that Colonial was floating, it only conducted three wholesale audits in the first seven months of 1974. (879-80.)

Ford Credit expressed no concern about Colonial

floating to finance its liquidity (PX-64.), and just as Mr. Belnap had not been advised about the increase in Colonial's planning volume, (233, 436, 441-42.), he was not advised that Colonial's new car inventory was overline, that Colonial's working capital was inadequate or that it was floating against Ford Credit. (233-35, 95, 441-42, 446-47.) Indeed, on July 30 in an internal memorandum, Ford Credit recommended that Colonial's new car flooring line be increased from $1.2 Million to $1.7 Million and concluded that Colonial "all in all . . . [had] . . . done a respectable job." (PX-64.)

During August, however, Ford Credit's policy abruptly changed and it reached a decision to audit and reaudit Colonial Ford to dry up Colonial's float. (448, 501-02; PX-66, PX-67.) On August 26, 1974 Mr. Belnap was informed that Colonial was out-of-trust and would need $218,000.00 by September 1 to clean up its float. (PX-25.) This was the first time that Mr. Belnap had been informed that Colonial was floating or that additional working capital would be required by the dealership. (234-35.)

Pursuant to its plan, Ford Credit commenced to audit and reaudit Colonial to dry up its float and on September 10 when Colonial was unable to pay off a wholesale audit, Ford Credit suspended the wholesale line. (238, 502-03; PX-68.) When Mr. Belnap discovered that Colonial had been running overline and floating against Ford Credit, he negotiated a settlement with Mr. Pease under which Mr. Pease resigned from the dealership, and Mr. Belnap resumed control. (240-43, 304.) Even though Colonial now under Mr. Bel-

nap's active direction, was able to pay off the out-of-trust condition within two weeks by September 24, and was never out-of-trust again (239-40.). Ford Credit refused to restore Colonial's wholesale line. (239, 503.) Unable to finance the purchase of new cars Colonial's new car inventory shrank month by month and it sustained heavy losses. By August 1975 when the trial court entered a preliminary injunction after an evidentiary hearing, Colonial's new car inventory was down to 35 and it was virtually out of business. (245-46; PX-33.)

REASONS FOR DENYING THE WRIT

The evidence presented issues of facts for the jury, not questions of statutory significance for this Court. The evidence demonstrated Ford, through a continual course of coercive conduct, had deprived Colonial of the right to run its own business and to control critical aspects of its business including its management, facilities and financing. Ford did not attempt to justify its conduct. It denied engaging in that conduct, and the jury resolved the factual disputes against Ford.

Ford's claim of a conflict between the Tenth Circuit's decision and the "philosophy" of *Sylvania* is nonsense. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *Sylvania* required a manufacturer's territorial resale restrictions be judged under the rule of reason. It did not immunize vertical restraints from antitrust scrutiny and it did not adopt a philosophy of "anything goes," including dealer independence, in the name of inter-brand competition. *Sylvania*, more im-

portantly, did not address ADDICA or the particular circumstances in the automobile industry that caused Congress to supplement the antitrust laws through the enactment of ADDICA.

Colonial did not claim and the Tenth Circuit did not hold ADDICA prohibited an automobile manufacturer from requiring adequate dealer representation both in facilities and management. On the contrary, the trial court gave and the Tenth Circuit approved an instruction holding an automobile manufacturer may "require" its dealers to adhere to reasonable standards in the areas of facilities and management. *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106, 110 (10th Cir. 1978).

Automobile manufacturers do depend upon their franchised dealers for market representation. Unquestionably, legitimate manufacturer concern with the quality of that representation is a significant perspective toward furthering competition between automobile manufacturers. But it is not the only component of competition in automotive marketing. What is good for General Motors is not necessarily good for its dealers or competition. Automobile manufacturers market their products through independent businessmen. The independence of automobile dealers in their key business decisions is a critical part of the competitive process.

Beyond question it was manufacturer domination and abuse of dealers' business independence that gave rise to the enactment of ADDICA. Congress in the legislative hearings leading to ADDICA found that

while dealers "were ostensively independent businessmen, the factory dominated and controlled almost every phase of their operations at all times. The conflict of interest between factory and dealer is a conflict between parties of totally unequal economic power." S. Rep. No. 2073, 84th Cong., 2d Sess. (1956). Congress, moreover, was alarmed at the heavy concentration of economic power in the big three automobile manufacturers, and recognized that intra-brand competition between independent dealers might provide the only remnant of effective competition in the industry. H. R. Rep. No. 2850, 84th Cong., 2d Sess. (1956). Congress' fundamental purpose in passing ADDICA was to redress the abuse and imbalance of economic power between manufacturer and dealer and protect the independence of automobile dealers. *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978); *Shor-Line Rambler, Inc. v. American Motors Sales Corp.*, 1976-2 Trade Cas. ¶ 61,130 (7th Cir. 1976); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir. 1976), *reh. denied; York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971).

Ford, itself, recognized that ADDICA draws a line between the reasonable demands of a manufacturer and unwarranted interference with dealer independence. In an internal operating manual Ford stated ADDICA ". . . prohibits the company from coercing dealers to take any action or forbear any action that they have a right to decide for themselves." (PX-41 at 5.) The proper perspective of the questions presented by the evidence is whether Ford's conduct shreaded that standard.

1. *Colonial's forced relocation and construction of a new uneconomic facility by Ford constituted actionable coercion and cannot be fragmented from Ford's other coercive conduct.* Colonial's Ford franchises had an "adequate facility" provision. (PX-6, PX-8, PX-10.) Colonial, however, did not have any contractual commitment to relocate and construct a new facility. *Id.* Colonial's claim and proof was Ford forced Colonial as part of a continual course of coercive conduct, to relocate and construct a new uneconomic facility, the size and cost of which Ford determined without regard for Colonial's economic interest. Colonial's proof demonstrated (1) Ford forced Colonial's relocation, site selection and new facility requirements under the threat of franchise termination; (2) Ford rejected suitable and far less expensive sites; (3) Ford, without consulting Colonial, determined the size and cost of Colonial's facilities; (4) Ford contrary to its normal procedure did so without any feasibility analysis; (5) Ford at trial did not attempt to justify its new facility requirements, but merely falsely denied imposing such requirements; and (6) the new facilities Ford demanded adversely impacted Colonial's profitability and liquidity by increasing Colonial's facility cost in terms of new vehicle sales by over 150%.

One of Congress' specific concerns in enacting ADDICA was that automobile manufacturers were forcing dealers to build new and uneconomic facilities in disregard of the dealers' interest. Thus, the legislative history notes:

> One dealer attributed the death of his brother to the pressure of seeing his life savings swept down the drain by factory cancellation because of the dealer's refusal to change his location. He wanted to stay in the center of town rather than build a monument to the factory on the outskirts. . . . (Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess. 486-87 (1956).)

The three circuit cases cited by Ford are not in conflict with this legislative history or the Tenth Circuit's decision. *Woodard v. General Motors Corp.*, 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962); *Ed Houser Enterprises, Inc. v. General Motors Corp.*, 595 F.2d 366 (7th Cir. 1978); *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963). In those cases there was no factual dispute. The dealers' facilities were inadequate. Other circuit decisions have held that a manufacturer's demand for a new and uneconomic facility constitutes coercion within ADDICA's prohibition. *Shor-Line Rambler, Inc. v. American Motors Sales Corp., supra; Accord, Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., supra. Shor-Line*, just as the Tenth Circuit's decision, no more holds that ADDICA prohibits a manufacturer from requiring adequate dealership facilities than the three circuit cases cited by Ford hold ADDICA grants a manufacturer a license to impose any facility requirements it desires. The cited circuit decisions are entirely consistent. They properly fall on either side of the line drawn by ADDICA. Reasonable manufacturer requirements with regard to facilities are sustained. Unreasonable and oppressive facility demands in disregard

of a dealer's economic interest, on the other hand, demonstrate coercion. The Fifth Circuit has expressly accepted this synthesis in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra.* In *York*, the Fifth Circuit pointed out with regard to the facility requirements of manufacturers:

> That certain specific conduct has been held not to constitute a violation of the Act in certain cases does not lead to the conclusion that such conduct would not violate the Act in the setting of another case.[8] The actions of the manufacturer must be considered under the circumstances arising in each particular case. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 793 (5th Cir. 1971).

Ford, moreover, improperly attempts to fragment Colonial's claim with regard to Ford's coercion. Ford attempts to separate Ford's conduct with regard to relocation from the entire course of Ford's dealings with Colonial. Ford's coercion with regard to Colonial's relocation cannot be practically separated from Ford's coercion with regard to Colonial's financing relationships with Ford Credit or Ford's coercion with regard to Ford's deprivation of Colonial's control over its dealership. Fragmentation of antitrust claims has been rejected by this Court, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); Congress in ADDICA's legislative history made it clear, and the courts unanimously hold that coercion may be found in the entire course of dealings between manufacturer and dealer, and may be inferred from a continual course of conduct. *Marquis v. Chrysler Corp., supra; Shor-Line Rambler, Inc. v. American Motors*

Sales Corp., supra; York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra; American Motors Sales Corp. v. Semke, 384 F.2d 192 (10th Cir. 1967), *reh. denied;* H. R. Rep. No. 2850, 84th Cong., 2d Sess. 4603 (1956).

2. *Ford deprived Colonial of the right to control its own business in violation of Ford's policy and ADDICA.* Ford's effort to portray Ford's conduct with regard to the Pease-Belnap transactions as nothing more than an attempt to involve a "car man" in the management of the dealership is a fictional account of the evidence. Ford insisted as a condition of reinstating Colonial's franchise that Mr. Pease be given full and absolute control of the dealership. (181-82, 185, 188, 397-99, 402.) The written contract Ford forced Belnap to sign expressly placed Pease "in charge" of the dealership, and left Belnap without authority over Pease or the dealership. (PX-4.) Ford at trial never attempted to justify its participation in the Pease-Belnap transaction, but falsely denied having anything to do with that transaction. Ford's conduct, moreover, violated Ford's own policy. The highest Ford official to testify at trial was a Mr. Geoffrey C. Curran, Ford's director of marketing operations. Mr. Curran categorically testified:

> Q: Would it be contrary to Ford's policies, Mr. Curran, to condition the granting of a franchise or the renewal or continuation of a franchise . . . on the dealer relinquishing control and management of his own dealership?
>
> A: Very much contrary. (535.)

How can Ford now attempt to present a question to this Court based on a claim that its demands with regard to Colonial's management were reasonable when it categorically denied making any such demands at trial, and the demands that the evidence demonstrated it did make violated its own corporate policy?

An automobile manufacturer's claim that it has the right to determine who should control a dealership and compel the donation of a 49% interest in a dealership is manifestly inconsistent with the protection afforded by ADDICA, and the circuit courts have so held. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra; Shor-Line Rambler, Inc. v. American Motors Sales Corp., supra; Marquis v. Chrysler Corp., supra.* The Tenth Circuit's concurrence in this line of authority does not warrant further review by this Court.

CONCLUSION

The questions Ford claims are presented are not presented by the evidence, and the petition for certiorari should be denied.

DATED this 8th day of August, 1979.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1818

FORD MOTOR COMPANY, a Delaware Corporation,

Petitioner,

v.

COLONIAL FORD, INC., a Utah Corporation, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I.

Colonial Fails to Respond to Ford's First Reason for Granting the Writ, and Instead Seeks to Inject Irrelevant Factual Issues into the Proceeding.

In its petition for a writ of certiorari, Ford Motor Company ("Ford") requested review of specific legal determinations made by the Tenth Circuit in interpreting and applying the Dealer Franchise Act. Ford challenged the Tenth Circuit's ruling that Ford violated that act by requiring the performance of two commitments made by a

prospective dealer and its principal owner to induce Ford to grant a dealership franchise: (i) that the dealership would relocate to adequate facilities, and (ii) that an experienced and capable manager, Marshall Pease, would be named as a participant in the ownership and management of the dealership.

The first reason urged by Ford for granting the writ was that the precedential effect of the Tenth Circuit's decision will be to create an unwarranted impediment to the ability of automobile manufacturers to compete vigorously with one another through their franchised dealers, and a disincentive to franchising arrangements beneficial both to independent businessmen seeking to become franchised dealers and to automobile manufacturers. The effect of the judgment in those respects depends upon the *stated* grounds of the Tenth Circuit in determining that a violation occurred.

Colonial's brief in opposition gives short shrift to the only issues pertinent to Ford's first reason for granting the writ, *i.e.*, whether the *Tenth Circuit's* challenged legal determinations were correct, and if not, whether potential adverse consequences of the incorrect decision by that court merit this Court's attention. Instead, Colonial has principally addressed the question of whether the *jury* had before it bits and snatches of factual, evidentiary detail, much of it irrelevant to the Tenth Circuit's legal determinations, showing wrongdoing on Ford's part.

The tangled mass of disputed factual issues raised in Colonial's brief should not be permitted to obscure the fact that the Tenth Circuit held Ford liable under the Dealer Franchise Act for a specific and discrete violation, *i.e.*, enforcing "conditions to be met before a franchise

would be given" (A. 10a).[1] The *only* two "conditions" stated as grounds of the Tenth Circuit's decision are "the requirement that Mr. Pease be given a contract to buy into the dealership when created to the extent of forty-nine percent, and that the place of business be changed to a new location with new facilities." *Id.*

In the present context of a petition for certiorari, the bulk of Colonial's brief in opposition, devoted to marshalling evidence that Ford violated the Dealer Franchise Act in respects never referred to in the Tenth Circuit's opinions, is beside the point. It merely confuses the issue to argue, for example, that the evidence presented at trial showed that Ford coerced Colonial into obtaining its financing from Ford Credit; that Ford and Ford Credit neglected to keep Belnap apprised of the affairs of his dealership; that Ford Credit was at first overly lax with respect to Colonial's practice of "floating" on Ford Credit's money, and later overly strict.

No manufacturer reading the Tenth Circuit's decision to guide its franchising practices, and no court relying on that decision as precedent, could conceivably construe it as turning on such findings.

---

1. References to "(A. ____)" are to pages of the separate appendix to Ford's certiorari petition.

II.

Colonial Bases Its Principal Contentions on Misconstructions or Misstatements of the Trial Record.

Colonial structures its opposition on three principal contentions, each based upon a misconstruction or misstatement of the trial record. First, Colonial contends that Ford is precluded from seeking review of the Tenth Circuit's decision, on the basis of the erroneous assertion that Ford's petition contains a change in the "story" Ford presented to the jury at trial. Second, Colonial contends that Ford deprived Colonial of the right to control its business on the basis of (i) the erroneous assertion that Ford required a transfer of "absolute control" and construction of "uneconomic facilities", and (ii) the erroneous flat denial that Colonial had made a pre-franchise adequate-facilities commitment. Third, Colonial impliedly contends that the Dealer Franchise Act applies to Colonial's commitments made before its franchise was granted, on the basis of the erroneous assertion that the franchise was not a new one, but rather was a continuation of an old one. In arguing these points, Colonial goes not only beyond the reaches of the Tenth Circuit's opinions, but beyond the reaches of the factual record.

A. Ford Did Not "Change Its Story" in Petitioning for Certiorari.

Colonial asserts that the "story" on which Ford predicates its petition for certiorari is a different "story" from that upon which Ford relied at the trial. On the basis of that assertion, Colonial would have this Court deny the writ. In support of its assertion, Colonial points

to the testimony at trial of Ford employees, each of whom denied having engaged in certain specific conduct with regard to which he was being cross-examined. However, Ford's position on certiorari is in no way inconsistent with those denials. Ford's petition for certiorari does not state that those employees, or any Ford employees, engaged in the conduct in question.

Ford's position on certiorari is based upon the fact that, in granting the Colonial franchise, it relied upon commitments made on behalf of Colonial to assure Ford that Colonial would be in a position to provide effective representation for Ford products in the competitive arena. The fact that those commitments were made and relied upon by Ford was presented and not disputed at the trial.

With respect to the buy-in requirement, Belnap represented his intention to give Pease a buy-in when Belnap urged his franchise application upon Ford's Dealer Policy Board. JA 678-79, 1442, 1452.[2] Furthermore, Belnap's attorney represented to the Board at the same meeting that Belnap had full confidence in Pease's ability to manage the dealership successfully. JA 1454.[3] Finally, those representations were relied upon by Ford in granting the Colonial franchise. JA 678-79, 1316-20, 1324.

2. References to "JA-" are to pages of the Joint Appendix submitted by the parties on appeal of the district court judgment to the Tenth Circuit.

3. The need for the buy-in to assure Pease's continuing participation was underscored at the Board meeting. Pease represented there that he had left the Ford dealership with which he had formerly been associated and joined Belnap because he sought a situation in which he could obtain an equity interest in addition to managerial responsibilities. JA 1454.

Like the intention to provide Pease an equity interest, the intention to provide new, adequate facilities[4] was shown at trial to have been part of the program for Colonial's future outlined by Belnap at the Dealer Policy Board meeting to induce Ford to grant the franchise. JA 178, 678-79, 1316-20, 1324, 1442. And a commitment to provide adequate facilities was unequivocally written into Colonial's franchise application. JA 1430.

B. Ford Did Not Cause Pease to be Given Absolute Control of Colonial or Require Construction of an Uneconomic Facility.

Colonial urges that Ford implemented a broad scheme to "deprive Colonial of the right to run its business" (Brief in Opp. at pp. 2, 16, 18, 20, 26). To support this contention, Colonial argues that the buy-in requirement ousted Belnap of all control over Colonial and gave it to Pease (*Id.* at pp 3-4, 12-13, 26), and that the adequate-facilities requirement was an imposition by Ford on Colonial of an uneconomic facility (*Id.* at pp. 6-7, 14-18, 23). However, not only did the Tenth Circuit not reach those conclusions, but the jury could not properly have reached them.

1. *The Buy-In Requirement*

Colonial does not dispute Ford's claim that an automobile manufacturer may legitimately condition its acceptance of a franchise application upon inclusion of a qualified manager in equity ownership of the dealership. The obvious purpose

4. Ford's dissatisfaction with the facilities from which Colonial proposed to begin operations, and Ford's conviction that new facilities were necessary if the proposed dealership was to meet its competitive potential, had been clearly indicated to Belnap. JA 155-56, 319, 623-24.

of such a condition is to assure the manager's long-term interest in the dealership's success. Colonial argues, however, that in requiring Belnap to enter into the buy-in agreement with Pease, Ford did more than assure the equity participation of a qualified manager. Colonial argues that the agreement effectively ousted Belnap from all control of Colonial and placed sole and absolute control of Colonial in Pease.

Colonial's argument is premised on a confusion between what the jury may have understood Ford to have *demanded*, if Belnap's testimony was believed, and what the jury may have found Ford to have *accomplished* by its demands. Whether or not Ford desired, or demanded, that Pease be given sole control of the dealership, it is clear that the written buy-in agreement, by which "control" was allegedly transferred, refers to nothing more than the right to manage Colonial's daily business operations. Nothing contained in the buy-in agreement deprived Belnap, as the president and majority shareholder of Colonial, of the right to exercise ultimate control over corporate and dealership affairs.[5]

In its attempt to characterize the buy-in as a device by which Pease was given full control of the dealership, Colonial quotes only a portion of the relevant contractual provision (Brief in Opp. at p. 12). That provision, paragraph 5 of the buy-in agreement, reads in full as follows:

> "The Party of the First Part, Marshall Pease, shall be in charge of operating the franchise dealership and shall have the authority to carry out all rights, duties and obligations in connection thereto *with*

5. Even the right given Pease to manage daily operations was not exclusive of, but supplementary to Belnap's rights. As the Tenth Circuit explicitly found, Belnap and Pease *both* had full managerial authority and responsibility under the terms of Colonial's franchise (A. 12a).

> *respect to the daily operation.* The Party of the First Part agrees to discharge this obligation in a manner acceptable to Ford Motor Company." JA 1140. (Emphasis supplied.)

Colonial's statement (Brief in Opp. at p. 12) that this provision was dictated by Mr. Parr, a Ford representative, flatly contradicts the testimony of Colonial's own trial witness, Mr. Summerhays. Mr. Summerhays, an attorney who represented Belnap, testified that the provision was drafted by him for the specific purpose of making clear that Belnap was *not* surrendering ultimate control of the dealership to Pease. JA 397-98.

2. *The Adequate-Facilities Commitment*

The Tenth Circuit held that Ford violated the Dealer Franchise Act by requiring Colonial, before its franchise was granted, to commit itself to acquiring better facilities than it then had, and later holding Colonial to that commitment. Rather than address Ford's argument that a manufacturer may legitimately require and enforce such an adequate-facilities commitment to insure the competitive strength of its dealer, Colonial's brief in opposition, incredibly, flatly denies that Colonial made any such commitment (Brief in Opp. at pp. 14, 23). Treating relocation as if it were a new demand first made by Ford after Colonial's franchise was granted, Colonial argues that the demand was unreasonable because Colonial could not operate profitably from the larger new facilities.

Colonial's assertion that it "did not have any contractual commitment to relocate and construct a new facility" flies in the face of the Tenth Circuit's finding to the contrary (A.10a,15a), Colonial's formal pre-trial admission that it committed itself to acquire new facilities (JA 130),

and the express terms of the written application submitted by Colonial to obtain its franchise. That application (JA 1430), expresses Colonial's understanding and agreement that (a) the facilities it was to obtain from the predecessor dealership were not adequate to meet the standards specified in Ford's standard franchise agreement, (b) that its new franchise would be effective on condition that it use those facilities only on a temporary basis, and (c) that it would provide other facilities by July 1, 1970 that would comply fully with the standards specified in Ford's standard franchise agreement.

Nothing in the Tenth Circuit's opinions in any way adopts Colonial's contention that Ford acted unreasonably with respect to implementation of Colonial's adequate-facilities commitment during the term of the franchise. In fact, the jury could not properly have found that Ford forced Colonial to move to an "uneconomic" facility, since the evidence at trial showed unequivocally that the dealership's most profitable periods were those following the move to the new facilities. Indeed, Colonial relied, in presenting its rejected antitrust damage claim,[6] on a showing of profits made subsequent to relocation as a measure of the dealership's potential profitability. JA 1385, 1388.[7]

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6. The primary emphasis of Colonial's case at trial was on an alleged antitrust cause of action claiming a conspiracy with respect to Colonial's financing, allegedly culminating in a cut-off of Colonial's floor-plan credit line. The theory of causation relied upon by the Tenth Circuit in sustaining the Dealer Franchise Act claim, which attributed the cut-off of Colonial's credit line to the pre-franchise conditions required by Ford, originated with the Tenth Circuit, and was never urged at trial by Colonial.

7. Colonial claims that "[t]he adverse impact of Colonial's new facility on Colonial's liquidity and profitability was admitted by Ford" (Brief in Opp. at p. 7). Ford made no such admission,

(footnote continued on following page)

C. The Franchise Granted to Colonial Was a New Franchise, Not the Continuation of an Old One.

Ford required the buy-in and the adequate-facilities commitment in the period between May 1969, when Petty Ford, Inc. was notified that its franchise would be terminated, and September 1969, when Colonial received its Ford franchise. Colonial argues that it was not a "prospective" dealer during this period, and that Ford's two conditions were not "pre-franchise" conditions (Brief in Opp. at pp. 13-14). Colonial argues that because it was practically and technically the "successor" to Petty Ford, Inc., and because the Petty Ford, Inc. franchise was assigned to Colonial, Ford's two conditions should be treated as demands made upon an existing franchisee.

However, the substantive question of whether the Petty Ford, Inc. franchise was continued in Colonial or was a new franchise does not turn on whether Colonial was Petty Ford, Inc.'s "successor" or whether Petty Ford, Inc.'s franchise was formally assigned to Colonial. The question of continuation or not as a substantive matter turns on whether (i) Colonial was a corporate entity different from Petty Ford, Inc., and (ii) Colonial was merely taking over an ongoing dealer franchise issued to Petty Ford, Inc. or was the subject of a decision by Ford to terminate Petty Ford, Inc.'s status as a Ford dealer and grant to *Colonial* the right to be a Ford dealer.

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but, on the contrary, argued strenuously at trial that Colonial's downfall was caused by the refusal of its owners to maintain adequate amounts of working capital, and by their resort to financing Colonial's operations with Ford Credit's money rather than their own.

Prior to trial, Colonial formally admitted that it was not the "same legal entity" as Petty Ford, Inc. JA 131. Furthermore, the events which transpired between the notice of termination of Petty Ford, Inc. and the grant of Colonial's franchise clearly show that, apart from formalities and legal technicalities, an entirely new dealership was created to replace the ineffective Petty dealership.

As of the date of Ford's notice of termination, the Petty family owned the existing franchised dealership and participated in its management. Belnap had no equity investment in the dealership, no plans existed to renovate or replace the dealership's physical facilities, and Pease was a salaried employee. In the next few months, Belnap entered into a series of agreements designed totally to alter that situation. He agreed to buy out the entire interest of the Pettys and to sell Pease a minority interest in Colonial. On behalf of Colonial, Belnap agreed to replace the Petty Ford facilities and to accept assignment of the Petty Ford franchise. All these agreements were conditioned on Ford's approving Colonial as its dealer,[8] either by approving an assignment of the Petty Ford franchise to Colonial or by entering a new franchise agreement with Colonial. The approval took place on September 2, 1969, when Ford concurrently approved the assignment, terminated the Petty Ford franchise, and granted a new franchise to Colonial.

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8. Immediately before meeting with Ford's Dealer Policy Board, Belnap unconditionally invested in the dealership to the extent of 51%, but made his agreement with the Pettys to purchase the remaining 49% conditional on Ford's approval. JA 1449.

The Tenth Circuit, recognizing that the buy-in agreement and relocation commitment were made "before a franchise would be given", stated that they must nevertheless be considered part and parcel of the franchise relationship which was subsequently formed because they were "carried over into the formal dealership period" (A. 10a.). That conclusion reflects the erroneous legal determination of the Tenth Circuit that the Dealer Franchise Act in effect prohibits a manufacturer from insisting on ownership arrangements and facilities commitments while negotiating with an applicant for a franchise. It is by necessary implication a rejection of Colonial's theory that Ford imposed requirements on an existing franchised dealership.

III.

The Judgment of the Tenth Circuit Is in Conflict with the Pro-Competitive Philosophy of the Antitrust Laws and with Decisions of Other Circuits.

A. The Anti-Competitive Effect of the Tenth Circuit's Judgment

If the Tenth Circuit's decision were a correct expression of the law, an automobile manufacturer would be unable to rely upon commitments made during franchise negotiations, calculated to assure the manufacturer that it will receive effective product representation. Not only would this inhibit the vigor of interbrand competition among dealers, but, as explained in Ford's petition, dealer franchise applicants would be disadvantaged in their efforts to enter the automobile industry if they could not meet

all franchise standards at the time of first contact with a prospective franchisor.

Colonial points out, correctly, that the Dealer Franchise Act was intended to protect the right of franchised dealers to function as independent businessmen. The purpose of the legislation, however, was to protect existing franchisees against use by manufacturers of dealers' franchise investments as leverage to exact concessions. It was not enacted to permit an applicant for a new franchise to make promises in order to obtain a franchise, knowing that those promises can later safely be ignored.

The legislative history of the Dealer Franchise Act to which Colonial refers supports the view that it was not intended as an impediment to maintenance by a manufacturer of a competitive network of franchised dealers. As the House Report states:

> "The bill, however, does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise." H. R. Rep. No. 2850, 84th Cong., 2d Sess., *reprinted in* [1956] U.S. Code Cong. & Ad. News 4596 at 4603.

Furthermore, the House Report specifically refers to the antitrust objectives of the legislation in warning that it should not be applied as an impediment to achievement of pro-competitive objectives. The Report's statements to that effect, in the context of a manufacturer's efforts to increase sales by appointing *additional dealers* in an existing franchisee's location, apply *a fortiori* to a manufac-

turer's attempt to increase sales by insisting on *strengthening* the management and facilities of a prospective dealer:

> "The committee emphasizes that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. Appointment of added dealers in an area is a *normal competitive method* for securing better distribution and curtailment of this right would be inconsistent with the *antitrust objectives of this legislation*." *Id.* (Emphasis supplied.)

B. The Conflict with Decisions of Other Circuits

In its petition, Ford cited the decisions of three other circuits which conflict with the Tenth Circuit's judgment. Those decisions, *Woodard v. General Motors Corp.*, 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962), *Ed Houser Enterprises, Inc. v. General Motors Corp.*, 595 F.2d 366 (7th Cir. 1978) and *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963), upheld a manufacturer's right to rely on dealers' pre-franchise commitments to obtain new, adequate facilities during the franchise term.

Colonial attempts to reconcile the present decision with those decisions by relying on two false premises. The first false premise is that Colonial made no pre-franchise commitment to acquire new facilities.[9] The second is that the decisions of other circuits cited by Ford turned simply on a factual inquiry into whether the required new facilities were economic or not.

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9. The erroneousness of this premise has been demonstrated in Point II B.2. at pp. 8-9, above.

Thus, Colonial states (Brief in Opp. at p. 24) that, in the cases cited by Ford, the dealers' existing facilities required to be replaced were undisputedly inadequate, and, by implication, characterizes the holdings as simply determinations that the required replacement facilities were economic. Colonial then seeks to contrast these decisions with other decisions supposedly holding manufacturers liable for violating the Dealer Franchise Act by demanding a move to "uneconomic" facilities. It cites *Shor-Line Rambler, Inc. v. American Motors Sales Corp.*, 543 F.2d 601 (7th Cir. 1976), *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir. 1976) and *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). Colonial's characterizations of the holdings of both sets of decisions, those cited by Ford and those cited by Colonial, are misleading.

In *Woodard*, *Ed Houser* and *Milos*, the courts rejected dealers' claims that relocation demands were coercive on the ground that the dealers, as in the present case, had expressly committed themselves to relocation prior to, and as an inducement for, the grant of their franchises. The economic wisdom of that commitment was not critical to those courts' decisions. What was critical was that pre-franchise commitments had been made which were designed to assure the manufacturer that its dealer would "have the facilities for coping with the sales efforts of those who are dealing in the products of competitors." *Woodard*, *supra*, 298 F.2d at 128.

In *Milos*, for example, Ford granted a franchise after receiving a commitment that new facilities would be acquired within two years. All parties there had not agreed that Ford's aim was to move the dealer to "reasonable" or "economic" facilities. When Ford called on the dealer to fulfill its commitment, the dealer replied that while "he

was willing to engage in a reasonable building program . . . the size of the facilities suggested by the Ford representatives was unreasonable." 317 F.2d at 714. At trial, the "essence" of the dealer's claim was that Ford's "sales and facilities requirements were oppressive and unreasonable." 317 F.2d at 715. Apparently the jury agreed, for it awarded the dealer a verdict on its Dealer Franchise Act claim. Nevertheless, the Third Circuit affirmed judgment for Ford notwithstanding the verdict. It held that "[a]n attempt to enforce an unambiguous contractual obligation", under those circumstances, "can hardly be said to constitute coercion or intimidation." 317 F.2d at 717-18.

By contrast, *Shor-Line Rambler* involved a situation in which no pre-franchise commitment with respect to facilities had been made by the dealer. On the contrary, the court found that, at the time the franchise was granted,

> "American Motors personnel reported to their home office that the floor space available at Shor-Line was adequate and that the present location and appearance of the facility were satisfactory." 543 F.2d at 603.

Subsequently, during the term of Shor-Line's franchise, American Motors abruptly demanded that Shor-Line relocate:

> "Shor-Line was given 90 days to totally change its character. Not only were extensive personnel changes required, but new facilities were requested, all of which demanded unreasonable and unrealistic expenses for the dealer." 543 F.2d at 604.

The court upheld the jury's finding that American Motors' surprise attempt to change the character of the dealership during the term of the franchise was coercive.[10]

CONCLUSION

Because the Tenth Circuit's decision, in conflict with the decisions of other circuits, places an interpretation on the Dealer Franchise Act that would have a significant adverse effect on competition and franchising in the automobile industry, this Court should grant certiorari.

August 24, 1979

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10. Neither *Randy's Studebaker Sales* nor *York Chrysler-Plymouth* supports the proposition for which it is cited, and Colonial's statement (Brief in Opp. at p. 25) that its quotation from *York Chrysler-Plymouth* was made "with regard to the facility requirements of manufacturers" is inaccurate.